88-620

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1987

BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNSEL FOR THE PETITIONER

QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals erred in granting enforcement of a decision of the National Labor Relations Board (the "Board") because of the denial of due process to the Petitioner by the Administrative Law Judge at the underlying unfair labor practice hearing?

2. Whether the Sixth Circuit Court of Appeals applied the proper standard of review to the question of whether the Petitioner was accorded a fair and impartial hearing before the Board's Administrative Law Judge?

LIST OF PARTIES

Pursuant to Rules 21 and 28.1, the parties involved and having an interest in this Petition are as follows:

Petitioner: Baddour, Inc. is a publicly-owned corporation with its principal place of business in Memphis, Tennessee. There are no affiliates or subsidiaries of the Petitioner.

Respondent: National Labor Relations Board, a government agency.

Charging Party: Highway and Local Motor Freight Employees, Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, is a labor organization seeking to represent a unit of employees employed by the Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Baddour, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in National Labor Relations Board v. Baddour, Inc., Civ. No. 86-6224 (6th Cir. 1988), petition for rehearing en banc denied.

OPINIONS BELOW

The decision and order of the Board's Administrative Law Judge is reported at 281 NLRB No. 84 (1986) and is attached as Appendix "D." The decision of the Board is reported at 281 NLRB No. 84 (1986) and is attached as Appendix "C." The per curiam opinion of the Sixth Circuit is unreported and is attached as Appendix "B." The Denial of Petitioner's Petition for Rehearing En Banc is also unreported and is attached as Appendix "A."

JURISDICTION

Judgment of the Sixth Circuit was entered on May 18, 1988. Timely Petition for Rehearing En Banc was denied by the Sixth Circuit on August 15, 1988. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are:

1. Sections 8(a)(1), 8(a)(3), 8(a)(4), and 10(e) of the National Labor Relations Act, 29 U.S.C. §§158(a)(1), 158(a)(3), 158(a)(4), and 160 (e).

2. Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. §§102.35 and 102.64(a).

3. Judicial Code and Judiciary, 28 U.S.C. §144.

Pertinent portions of these statutory provisions are reproduced as Appendix "E."

I.

STATEMENT OF THE CASE

This matter arises from the attempt of Teamsters Local 667 to organize certain employees at the Petitioner's distribution warehouse in Memphis, Tennessee. An election was conducted among those employees on October 29, 1982, and the union failed to receive a majority of the ballots cast. The Teamsters filed a number of charges with the Board alleging that the Petitioner committed certain unfair labor practices. A hearing was held on the consolidated charges before the honorable Administrative Law Judge George C. Norman (the "ALJ") in Memphis. The hearing lasted eleven days spanning a three-month period. All parties were present at each of the hearing dates. This petition is

directed to the conduct of the ALJ at the hearing as it concerns the Petitioner's due process rights.

On October 11, 1983, the ALJ rendered his decision and order, finding in pertinent part that the Petitioner had violated Sections 8(a)(1), (3), and (4) of the National Labor Relations Act (the "Act"). The Petitioner timely filed exceptions to the ALJ's decision and order with the Board in Washington. In support of its exceptions, the Petitioner alleged that a number of the ALJ's findings and conclusions were not supported by record evidence and that during the conduct of the hearing, the ALJ was motivated by unlawful bias and prejudice toward the interest and position of the Petitioner.

On September 26, 1986, the Board issued its Decision in which it rejected most of the Petitioner's exceptions and adopted the ALJ's Decision almost in toto. See NLRB's Decision at Appendix "C."

Concerning the Petitioner's claim that it was denied due process at the hearing because of the ALJ's conduct of the hearing, the Board noted that certain of the ALJ's remarks were "unwise" but nonetheless concluded that there was no evidence of obvious bias toward the Petitioner. Accordingly, the Board left intact most of the ALJ's findings and conclusions.

In order to test its validity, the Petitioner refused to comply with the Board's Order, and the Board petitioned the Sixth Circuit for enforcement. On

review, the Sixth Circuit granted enforcement, finding no merit to the Petitioner's argument that it was deprived of a fair hearing by the ALJ. In enforcing the Order, the Sixth Circuit stated: "[w]hile we do not altogether approve of the manner in which the A.L.J. conducted the hearing, his indiscretions did not amount to a due process violation." Appendix B at B-6. In so ruling, the Sixth Circuit failed to express any legal standard by which it analyzed the ALJ's conduct at the hearing. While the appellate court did require the Board to respond to the Petitioner's Petition for Rehearing En Banc, it denied the Petition without comment by Order dated August 15, 1988.

II.

REASON FOR GRANTING THE WRIT

The record fully reveals that the ALJ committed multiple acts of prejudicial error that resulted in the denial of a fair hearing to the Petitioner. A summary of the ALJ's conduct follows.

The first example of prejudicial error committed by the ALJ was his incorrectly limiting the Petitioner's ability to cross-examine the General Counsel's witnesses on credibility while permitting the General Counsel to cross-examine on a much broader standard. The next significant example of prejudicial error by the ALJ was his usurping the role of the General Counsel and taking over the examination of the Petitioner's witnesses. Not only did the ALJ's

examination interrupt and disrupt the Petitioner's case, but his questions were not related to the substance of the Petitioner's questions or to the responses of the witnesses. While these actions not only reek of hostility, they also demonstrate inherent unfairness because the General Counsel and General Counsel's witnesses were not subject to the same type of questioning and treatment by the ALJ.

The next significant episode of prejudicial error by the ALJ was his unprovoked and unwarranted attacks upon the character of the Petitioner's witnesses. The following summarizes separately those unfounded accusations:

a. Paul Baddour (President) -- ALJ insinuated that if Mr. Baddour had not been an attorney, he would not have

had any qualms about terminating employees.

b. Greg Taylor (employee, witness for Petitioner) -- ALJ accused Mr. Taylor at the hearing of changing his testimony when clearly he had not done so.

c. Joe Talley (supervisor) -- ALJ attempted to elicit Mr. Talley to state that he was offended by Mr. Baddour's references to Christianity and morality.

d. Fred Stearns (Personnel manager) -- ALJ badgered witness and made overt, disparaging comparisons to how Mr. Stearns had handled certain situations and how a "competent" manager would have handled the same situation.

e. McDonald and Richardson (employees on employee non-union committee) -- ALJ sua sponte initiated line of questioning into formation of employee non-union committee despite the complete absence of any allegation in the complaint as to unlawful employer assistance in the formation of the same. When Counsel for the Respondent

> alerted the ALJ to that fact, the ALJ engaged in a discussion with General Counsel designed to suggest that General Counsel take over that line of questioning.

The final prejudicial error committed by the ALJ at the hearing is also perhaps the most serious. The ALJ ordered the expulsion of one of the Petitioner's counsel and threatened to expel the Petitioner's lead counsel. The ALJ's handling of that situation was completely unwarranted and an absolute abuse of his discretion. Obviously, this totally disrupted the presentation of the Petitioner's case. It is inconceivable that the ALJ's conduct was justified when considered in the context that (1) his exclusion of counsel came on the heels of the Petitioner's verbal motion for the ALJ to recuse himself - which he denied

out of hand -- and (2) that the ALJ had to take a fifteen minute recess to regain his composure. Indicative of the ALJ's demeanor is his statement on the record made shortly before the ejection of counsel:

> "I don't want anything for the record that I don't want in there. I'm running this hearing and not you."

Tr. 1700.

The foregoing are examples of the ALJ's conduct which the Board and the Sixth Circuit concluded did not evidence open bias against the Petitioner.[1] Had the Board and reviewing court applied the correct standard of review -- that the ALJ should have avoided even the

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1/ The Board did overrule the ALJ's findings and conclusions in several respects as being clearly contrary to the record evidence. See Appendix C.

appearance of bias or hostility -- it is submitted that the ALJ's decision and order would have been vacated and a new hearing directed to protect the Petitioner's due process rights.

III.

THE SIXTH CIRCUIT ERRED BY FAILING TO APPLY THE PROPER STANDARD OF REVIEW TO THE ALJ'S CONDUCT

It cannot be gainsaid that fundamental due process requires that parties to an administrative proceeding be afforded proper notice and a fair and impartial hearing. This elementary precept had it genesis in the 1935 Wagner Act by the Congressional guarantee that no order of the Board will be enforced unless supported by "substantial evidence

on the record considered as a whole."[2] 29 U.S.C. §160(e) (emphasis added).

This Court elaborated upon this guarantee of due process in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). There, the Court opined that "whole record" is not limited simply to evidence which supports the Board's decision:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of

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2/ Originally, the Wagner Act only required that Board orders be supported by "evidence." The 1947 Amendments contained in the Taft-Hartley Act added the underscored language.

> review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

340 U.S. at 487 and 488 (emphasis added).

On the same day the seminal Universal Camera decision was issued, this Court decided NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951). That decision involved a ruling in which the Sixth Circuit had vitiated the Board's finding of a violation because of the examiner's bias. As found by the Sixth Circuit, the ALJ had drawn inferences

from testimony against the clear weight of the record as a whole. This Court affirmed the appellate court's ruling and observed that the Sixth Circuit had "painstakingly reviewed the record" and unanimously concluded that the Board's findings were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed "substantial." 340 U.S. at 502.

These principles mandate that a reviewing court must not merely defer to an administrative agency's findings of fact, but must also review the evidence, particularly that suggesting bias or partiality, closely and in its entirety. This appeal is taken to present to this Honorable Court the question of what standard should be applied by the courts

in reviewing Board decisions in which it is alleged that a Board ALJ acted in an arbitrary and biased manner toward a party, thereby impugning the concept of due process. Because there exists a divergence of authority among the circuits and because the facts of this case present an ideal vehicle for resolution by this Court of this important issue, the Petitioner requests that the Court issue a Writ of Certiorari to the Sixth Circuit to review the case sub judice.

1. The "Appearance of Hostility of Bias" Standard.

A fair trial by a fair and impartial trier of fact is the touchstone of fundamental due process. The requirement of impartiality must be vigorously protected to insure that the

integrity of this rudimentary precept of fairness is not vitiated.

In contemplating the application of the due process concept to adjudicating governmental agencies, this Court has observed that "[i]ts exact boundaries are undefinable, and its content varies according to specific factual contexts," but stated flatly that "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." Hannah v. Larche, 363 U.S. 420, 442 (1960). Speaking broadly on the ambit of due process, this Court in In re Murchison, 349 U.S. 133, 136 (1955), announced:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always

> endeavored to prevent even the probability of unfairness. (Emphasis added.)

The Sixth Circuit, in reliance upon those principles, concluded in Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986), that the fairness required under procedural due process as it relates to quasi-judicial administrative hearings is the absence of actual bias and, indeed, "even the probability of unfairness."

The courts have long recognized in Board proceedings that even the appearance or suggestion of bias is patently offensive to the concept of due process. In Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979), the First Circuit commented on the duty of courts to safeguard litigants' rights to a fair administrative trial against the

backdrop of adjudicatory unfairness. In setting aside the Board's order enforcing the ALJ's decision, in large part due to the conduct of the ALJ at the hearing, the First Circuit noted:

> We realize that tempers and patience run short in extensive, hard fought labor-management hearings. But this makes it all the more important for the presiding officer to set an example of evenhandedness. The sharp retort, the sly dig, the sarcastic innuendo cannot fail to give the appearance of injustice, no matter how sound and fair may be the final judgment.

599 F.2d at 1071 n.4 (emphasis added). The Fifth Circuit has also endorsed a similarly stringent standard. In Helena Laboratories Corp. v. NLRB, 557 F.2d 1183 (5th Cir. 1977), the Fifth Circuit addressed the urgent need for upholding

the minimal fundamental fairness in quasi-judicial agency proceedings:

> [A] fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

557 F.2d at 1188; quoting from NLRB v. Phelps, 136 F.2d 562, 563-64 (5th Cir. 1943).

Indeed, this Court has previously underscored the obligation of agencies to refrain from the appearance of

impropriety. Justice Frankfurter cautioned the Board against failing to exercise appropriate judicial control in NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947). In that case, an employer appealed from a Board order remanding part of a case back to the same trial examiner that had previously denied it a fair hearing. While not finding the Board's order in that instance to be unwarranted, the Court warned as follows:

> The Board might have gone beyond the legal compulsions and ordered the new evidence to be heard before a new Examiner who could report with a mind wholly free from prior litigious embroilments. The Board might have been well advised also to allow greater leeway in admitting evidence not strictly relevant. It takes time to avoid even the appearance of grievances. But it is time well spent, even though it is not easy to satisfy interested parties, and

> defeated litigants, no matter how fairly treated, do not always have the feeling that they have received justice.

330 U.S. 219 at 237 (emphasis added).

The Board itself has consistently and fully embraced the "appearance of hostility" standard with respect to ALJ misconduct. In Engineers Beneficial Assn. District 1 (Crest Tankers), 274 NLRB 1481 (1985), the Board considered a motion by the General Counsel to recuse the ALJ on the grounds of bias and hostility. Granting the General Counsel's motion, the Board announced:

> . . . the Board notes that its proceedings should be free from any appearance of partiality or bias on the part of its administrative law judges. In granting the motions to recuse, the Board does not mean to imply that the administrative law judge is, in fact, prejudiced or biased. In all the

> circumstances, however, the Board is of the opinion that all parties would be better served if this matter were heard de novo before a different administrative law judge.

274 NLRB at 1482 n.5 (emphasis added). See also, Member Hunter's concurrence at 1485 ("[t]his kind of sarcastic repartee has no place in our proceedings and leaves an impression that the judge is not giving dispassionate consideration to arguments before him and is growing hostile to counsel."). This long-standing principle was stated earlier in Indianapolis Glove Co., 88 NLRB 986, 987 (1950), and was recently reaffirmed in Dayton Power & Light Co., 267 NLRB 202 (1983), and in Reading Anthracite Co., 273 NLRB 1502 (1985):

> [I]t is essential not only to avoid actual partiality and

> prejudgment . . . in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal. (Emphasis added.)

It thus becomes clear that due process is an imperative factor in determining whether "substantial evidence on the record considered as a whole" supports the administrative decision. Both the courts and the Board contemplate that the appearance of partiality is just as violative of that right as is actual partiality.

2. "Extra-Judicial" Source Standard.

Other courts have imposed a more onerous standard for reviewing ALJ impropriety. In Colfor, Inc. v. NLRB, 838 F.2d 164 (1988), the Sixth Circuit issued a decision which constituted an abrupt and unexplained departure from its earlier adherence to the "appearance of

hostility" standard in Utica Packing Co., supra. In Colfor, the Sixth Circuit summarily announced that bias must be shown to "stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case," quoting from United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

The Grinnell rationale should not be invoked by the courts in reviewing NLRB proceedings. First, Grinnell involved a motion to disqualify a federal district judge from hearing the merits of an antitrust action made pursuant to 28 U.S.C. §144 (see Appendix E), and it involved much less egregious facts than presented in the instant case. Secondly, the Grinnell standard is directly at odds with the solid line of this court,

appellate courts, and of the Board reflecting an attitude that it is the appearance of hostility that should be avoided in such matters rather than requiring proof of actual bias. Stated simply, the Grinnell standard represents an unwarranted and unnecessary departure from established court and agency precedent, does not comport with the concept of rudimentary fairness, and would essentially make any review of ALJ partiality illusory.[3]

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[3]/ The Fourth Circuit has also adopted the Grinnell standard in like cases. NLRB v. Top Form Mills, Inc., 789 F.2d 262 (4th Cir. 1986). The Seventh Circuit has endorsed a similarly stringent standard, defining bias as "complete disregard for sworn testimony coupled with a tongue-in-cheek characterization of those utterances." Medline Industries, Inc. v. NLRB, 593 F.2d 788, 795 (7th Cir. 1979). It does not appear that any movant has ever successfully established bias when faced with the Grinnell standard of review.

For those reasons, the Court should grant the Petitioner's application, issue a writ of certiorari to review the Sixth Circuit's enforcement of the Board's order, and determine that the proper standard to apply in this case and in other similar Board cases is the "appearance of hostility" standard.

IV.

THE REQUIREMENTS OF DUE PROCESS WERE NOT MET IN THIS CASE

An examination of the record of the unfair labor practice hearing reveals that the Petitioner was denied a fair, impartial hearing before the ALJ. The specific violations will be addressed below.

The ALJ's barbed attacks against the Petitioner's president on the grounds of his professional integrity and,

subsequently, against witness Talley concerning his religion are patently offensive to the concept of due process. In NLRB v. Aluminum Cruiser, Inc., 620 F.2d 116 (6th Cir. 1980), the Sixth Circuit found that an employer did not receive a fair hearing where the ALJ made inexcusable, injudicious attacks on its president including one directed at his ethnic background. Here, as in Aluminum Cruiser, this Court should find the ALJ's comments "could not but taint the entire proceeding." 620 F.2d at 118. Likewise, the ALJ's exploring new theories of violations even to the surprise of the General Counsel is entirely at odds with fundamental due process. See NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 548 (6th Cir. 1984) ("Due Process requires that a party charged with unlawful

conduct be given a `meaningful opportunity to meet the complaint.'" citing NLRB v. Complas Industries, Inc., 714 F.2d 729, 733 (7th Cir. 1983)).

Likewise, by limiting the Petitioner's right to cross-examine witnesses for credibility while allowing the General Counsel to cross-examine without any such limitation, the ALJ committed clear prejudicial error. In NLRB v. Overseas Motors, Inc., 818 F.2d 517 (6th Cir. 1987), when an ALJ committed a similar error, the Sixth Circuit remanded the case back to the Board to permit the employer to inquire into relevant areas. In addition, the ALJ permitted the General Counsel to offer hearsay while declining to allow the Petitioner to offer similar hearsay testimony. Another gross procedural

disparity was the ALJ's refusal to allow the Petitioner to engage in surrebuttal while at the same time allowing the General Counsel to engage in redirect. See Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947 (6th Cir. 1968) (employer was prejudiced by examiner's refusal to permit employer to establish defense, by examiner's assuming role of General Counsel, and by his preconceived notions as to theory of complaint).

The record also is replete with evidence that the ALJ made numerous inappropriate comments at the close of the Petitioner's examination of its witnesses. Cp. Lawson Co. v. NLRB, 753 F.2d 471 (6th Cir. 1985) (one isolated comment after witness testified does not demonstrate ALJ's predisposition). The ALJ's incredible unprofessionalism raises

such a specter of uncertainty concerning his ability to render an unbiased ruling that this Court should resolve any question in favor of the Petitioner.

Finally, the ALJ's expulsion of the Petitioner's counsel and repeated threats to its lead counsel were absolutely unwarranted and a complete abuse of discretion. See Engineers Beneficial Assn. District 1 (Crest Tankers), supra (exclusion of counsel from unfair labor practice hearing was abuse of discretion).

CONCLUSION

There are two standards of review which have been followed by the various circuit courts when determining whether a decision of the Board should be enforced when there are allegations that the Board ALJ was biased toward a party -- the

"appearance of hostility" standard and the more stringent Grinnell standard. In the instant case, the Sixth Circuit did not indicate which standard it was following. The court merely stated that the Petitioner's assertion of bias was "without merit" and that there was "no evidence that [the Petitioner] was deprived of a fair hearing . . . ." Sixth Circuit's Decision at Appendix B, pp. B-6, B-7.

It is submitted that the appearance of hostility standard is the proper standard of review and that had the Board and the Sixth Circuit followed such a standard, the ALJ's findings and rulings would have been disallowed, and a new hearing would have been ordered before an impartial trier of fact. It is further submitted that the instant case is the

proper vehicle for this Court to resolve the conflict among the circuits, and to establish the proper standard for future Board proceedings and the proceedings of other administrative tribunals.

WHEREFORE, the Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari and grant it relief from an improper decision.

Respectfully submitted, this 7th day of September, 1988.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of September, 1988, I served three copies of the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit upon each of the following by United States mail, postage prepaid:

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VOLUME I

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APPENDIX "A"

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BADDOUR, INC.,
Respondent,

No. 86-6224

United States Court of Appeals,
Sixth Circuit
August 15, 1988

ORDER

BEFORE: NELSON and NORRIS, Circuit Judges and SPIEGEL*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having

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*Hon. S. Arthur Spiegel sitting by designation from the Southern District of Ohio.

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
LEONARD GREEN, Clerk

APPENDIX "B"

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BADDOUR, INC.,
RESPONDENT

No. 86-6224

United States Court of Appeals,
Sixth Circuit
May 19, 1988

ON PETITION FOR ENFORCEMENT
OF AN ORDER FROM THE
NATIONAL LABOR RELATIONS BOARD

BEFORE: NELSON and MORRIS, Circuit Judges; and SPIEGEL, District Judge.*

PER CURIAM. The National Labor Relations Board ("the Board") petitions for enforcement of its order finding that respondent, Baddour, Inc., violated subsections 8(a)(1), (3) and (4) of the

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*Hon. S. Arthur Spiegel sitting by designation from the Southern District of Ohio.

National Labor Relations Act ("the Act"), 29 U.S.C. §158(a)(1), (3), (4), by coercively interrogating its employees; by maintaining and giving effect to an invalid no solicitation/no-distribution rule; by discharging, demoting, warning or otherwise disciplining employees engaged in protected, concerted activities; and by causing the cessation of an employee's workers' compensation benefits. The Board's order required Baddour to cease and desist its unfair labor practices, to reinstate and make whole employees who were unlawfully discharged or otherwise disciplined, to preserve and make available for inspection certain business records, and to post a notice. The order also set aside an election and ordered a new

election; however, that portion of the order is not before this court.

Baddour requests this court to deny enforcement of the order and dismiss the complaint, or remand the case for a new hearing. It asserts that there was insufficient evidence to find it in violation of the Act, and that the administration law judge was biased, with the result that Baddour was denied due process of law.

This matter arises from attempts by Local 667 of the Teamsters Union to organize certain employees of Baddour's Memphis, Tennessee facility. Between the September 1982 filing date of the election petition and the February 1983 hearing date, numerous unfair labor practice complaints were filed by the

union against Baddour. These cases were consolidated and were heard by an administrative law judge who found that Baddour had engaged in unfair labor practices in violation of subsections 8(a)(1), (3) and (4) of the Act and recommended that Baddour take corrective action regarding certain employees. Baddour filed exceptions to this decision with the Board, primarily arguing that the A.L.J. exhibited extreme bias against it during the hearing. On September 26, 1986, the Board issued its order, reported at 281 N.L.R.B. No. 84. The Board subsequently adopted the A.L.J.'s decision, finding that certain actions of Baddour had indeed violated subsections 8(a)(1), (3) and (4) of the Act, but that others did not. This petition for enforcement followed.

A reviewing court must uphold and enforce the decision of the Board when substantial evidence on the record as a whole supports its findings, even though it might justifiably have made a different choice had the matter been before it de novo. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); NLRB v. Okum Bros. Shoe Store, Inc., 825 F.2d 102, 105 (6th Cir. 1987), cert. denied, 108 S.Ct. 1109 (1988).

Baddour contends that the A.L.J. exhibited bias by harassing and intimidating its witnesses; by making inconsistent evidentiary rulings favoring the general counsel; by flippantly commenting upon the testimony of company witnesses; and by banning one of its attorneys from the hearing, and threatening its lead counsel with

expulsion, for their continuous objections.

We have carefully reviewed the briefs and record in this case and agree with the conclusion of the Board, made after serious consideration of the allegations, see 281 N.L.R.B. No. 84 at 1, n.2, that each of these assertions is without merit. While we do not altogether approve of the manner in which the A.L.J. conducted the hearing, his indiscretions did not amount to a due process violation. A review of the transcript discloses that this was a bitterly contested case before the A.L.J. and that he did a good deal of probing in an effort to obtain the truth. Friction developed between the A.L.J. and counsel for Baddour. However, an A.L.J. possesses wide latitude in the conduct of

the hearings before him regarding direct and cross-examination, the handling of objections, and arguments of counsel. 29 C.F.R. §§102.35, 102.64(a) (1987); see, e.g., NLRB v. Overseas Motors, Inc., 818 F.2d 617, 520 (6th Cir. 1987) (A.L.J. can interrupt or question witness to clarify testimony). We find no evidence that Baddour was deprived of a fair hearing, and are not persuaded that it was deprived of due process.

Baddour also argued that the alleged bias of the A.L.J. so tainted his judgment that the credibility resolutions he made against Baddour should not stand. Credibility determinations "will be upheld if they are `reasonable,' or if they have a `rational basis.'" NLRB v. Garon, 738 F.2d 140, 142 (6th Cir. 1984) (citations omitted). It is clear from

its opinion that the Board did not simply accept the A.L.J.'s findings, but made a thorough evaluation of evidence presented at the hearing. Although it rejected several of the findings of the A.L.J. of unfair labor practices by Baddour, the Board agreed that certain actions taken by Baddour violated subsections 8(a)(1), (3) and (4) of the Act. We conclude that there was substantial evidence on the record as a whole to support the Board's finding that Baddour had violated the Act.

Accordingly, we grant enforcement of the Board's order.

APPENDIX "C"

JBS

281 NLRB No. 84

D--4009
Memphis, TN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BADDOUR, INC.

and

HIGHWAY AND LOCAL MOTOR FREIGHT EMPLOYEES, LOCAL 667, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	Cases 26-CA-9846 26-CA-9957 26-CA-6527[1]
ELTON HILL, an Individual	Case 26-CA-9997
JERRY LEONARD WILLIAMS, an Individual	Case 26-CA-10121

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION

1/ This case number appears as corrected.

On 11 October 1983 Administrative Law Judge George Norman issued the attached decision. The Respondent and the General Counsel filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and

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[2]/ The Respondent excepts to the judge's failure to grant its motions to strike testimony and reject evidence, and to reopen the record. The Respondent also excepts to the judge's granting of the General Counsel's motions to correct the transcripts and to consolidate cases for hearing. We find no merit in these exceptions.

The Respondent was represented at hearing by counsel William E. Hester III

and Theresa Gallion. On 20 April 1983 after 10 days of hearing, the judge limited Gallion's participation in the cases to assisting Hester at counsel's table. On 1 July 183, the Respondent requested that the judge withdraw from these cases, contending he was biased, based on certain evidentiary rulings by the judge, his "excessive" questioning of the Respondent's witnesses, his alleged unprofessional conduct, and his threats to exclude the Respondent counsel from the hearing and the ultimate "exclusion" of Gallion. In his decision, the judge denied the Respondent's motion as without merit. The Respondent excepts to this denial and asserts that the judge's rulings and decision are the result of bias. After a careful review of the record, we are satisfied that the judge's evidentiary rulings did not prejudice the Respondent's presentation of evidence. We are also satisfied that the judge's conduct at hearing was consistent with his obligation to develop a full record and that certain of his remarks, while unwise, did not evidence bias. Furthermore, we find that the judge's decision to limit the participation of Gallion was not an abuse of his discretion and authority under Sec. 102.35 and 102.44(a) of the Board's Rules. The record reveals that on the 6th through 10th days of hearing, the judge repeatedly warned both counsel for the Respondent about arguing after his evidentiary rulings, objecting to questions that the judge previously had ruled were proper, needlessly

interrupting the testimony of witnesses, and making unnecessary statements on the record. These warnings included specific cautions that such conduct would lead to exclusion of counsel. On the 10th day of the hearing, during direct examination of witness Gatlin, the judge and counsel Gallion engaged in an extended colloquy on the record during which the judge repeatedly asked Gallion to cease arguing the point in issue and to remain quiet. Gallion persisted despite the judge's instructions. Following a brief recess, the judge ordered Gallion excluded in the interests of order, given her failure to heed his warnings. In further discussion, the judge noted that Gallion had acted contemptuously, but on request of cocounsel the judge modified his ruling to allow Gallion to remain in the hearing room and assist at counsel's table. The judge also excused witness Gatlin until Hester was prepared to resume the direct examination. The Respondent contends that Gallion should not have been excluded as her conduct was respectful and in furtherance of its interests as her client. While we are sensitive to the important role of the attorney-advocate in the administration of justice, we are equally attuned to the interest furthered by the orderly development of issues and evidence in hearing. We note as did the judge, that the Respondent's interests were adequately protected by the judge's willingness to grant the Respondent continuing objections to lines of inquiry considered improper by the Respondent. We

conclusions and to adopt the recommended Order as modified.[4]

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find no merit in the Respondent's contention that counsel's repeated objections and argument after adverse rulings were warranted. We conclude under all the circumstances that the judge's ruling limiting Gallion's participation in the hearing was not improper.

[3]/ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4]/ The Respondent's request for permission to incorporate by reference its brief to the judge in its brief to the Board is denied, inasmuch as it would result in the Respondent's brief being in excess of the 50-page limitation prescribed by the Board's Rules and Regulations.

Subsequent to the issuance of his decision, the judge issued an Erratum in which he amended his recommended Order to provide that the 29 October 1982 election

We agree with the judge that the Respondent violated Section 8(a)(3) by transferring employee Jerry (Lowell) Williams prior to the election from his cart control position, in which he had virtually unlimited access to all warehouse areas, to a consolidator position, in which he was limited to one specific area of the facility. In so doing, we note that the Respondent did not adequately explain its decision to transfer Williams, who had no experience as a consolidator, in light of the fact

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be set aside and a new election be directed. Thereafter, the Union filed with the Board a "Motion for Erratum and Further Specified Relief" in which it urged, inter alia, that the election be set aside, and the Respondent filed a motion to strike the Union's motion. In view of the judge's issuance of his Erratum and our decision here, we find it unnecessary to pass on the Union's and the Respondent's motions.

that experienced temporary employees were available, and it failed to replace Williams when he injured his hand shortly after the transfer, even though the injury rendered him unable to perform consolidator duties. We further note that the transfer of Williams is distinguishable from that of employee Hill, discussed below, in that with respect to Hill the General Counsel alleged but failed to establish that Hill's transfer resulted in more onerous working conditions.

We agree with the judge that the Respondent violated Section 8(a)(4) by causing the stoppage of Williams' workmen's compensation. At the hearing Williams testified that he had used his brother Lowell's application in obtaining his job. We note in particular that

Williams informed Supervisor Eason Camp in February 1981 that he was Jerry, and not Lowell, Williams. Although thereafter Williams' social security number was changed in the Respondent's personnel records, Camp encouraged him to retain use of the name "Lowell" around the warehouse. Thus the Respondent is, at least in part, responsible for the continued reference to Williams as "Lowell." Moreover, it was the Respondent's counsel, at the hearing, who introduced the question of Williams' real name when he attempted to impeach Williams' credibility by inducing him to admit that he was not "Lowell" Williams, as he had previously testified. Thus the Respondent's assertion that it had no knowledge of Williams' "true" identity

until after he testified is dubious at best.

We thus reject the Respondent's contention that it informed the insurance company of Williams' identity directly after his testimony only because of its newly perceived obligation to do so. We also find that the Respondent is not exonerated by virtue of the "request" for continuation of Williams' benefits made to the insurance company by Fred Stearns, the Respondent's personnel manager. Stearns could not reasonably have expected favorable consideration of such a request when coupled with a report that the insurance company had been paying benefits to the wrong person, particularly since Stearns failed to qualify his report with an assurance that Williams had reported his true name to

the Respondent. In these circumstances, and given the Respondent's other acts of discrimination against Williams, we conclude that the request for continuation was disingenuous at best and that the Respondent was in fact acting in retaliation against Williams for his testimony at the Board hearing.

While we agree with the judge that the Respondent's maintenance of its no-solicitation/no-distribution rule violated Section 8(a)(1) of the Act, we do so for the following reasons.

The rule set forth in the Respondent's employee handbook reads as follows:

> To avoid interruption of work and complications and distractions in our operations, employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections, or engage in any kind of solicitation during their working

> time, or in any way to interfere with the work of other employees.

Clearly, to the extent that the Respondent's rule prohibits employees from engag[ing] in any kind of solicitation during their working time"[5] that aspect of the rule is valid on its face under the Board's decision in Our Way, 268 NLRB 394 (1983). The rule, however, also states that "employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections," and, in our view, is ambiguous because the qualification "during working time" could reasonably be read as modifying only the proscription on solicitation.

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[5]/ The Respondent, in its personnel manual, subsequently changed this phrase to read "during the time they are supposed to be working." This change, however, does not affect our decision.

Interpretation of the rule is further complicated by the fact that the Respondent's clarification, issued in November 1981 in response to the Board's decision in T.R.W., Inc., 257 NLRB 442 (1981),[6] refers only to solicitation, making no mention of distribution or the other activities enumerated above. Thus both the rule and its "clarification" could be read as a blanket prohibition on these activities, leaving only solicitation during nonworking time as a permissible practice. Accordingly because ambiguous language in work rules is construed

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[6]/ We note that the Respondent's reliance on T.R.W., which was subsequently overruled in Our Way, resulted in no prejudice to the Respondent since the latter case increased the General Counsel's burden of establishing a violation.

against the promulgator of the rule, see, e.g., J.C. Penney Co., 266 NLRB 1223, 1224 (1983), we find that the Respondent's rule, insofar as it may be read as an overall prohibition on distribution of any kind, violates Section 8(a)(1) of the Act.

The judge further found that the Respondent violated Section 8(a)(3) and (1) of the Act by transferring employee Elton Hill to a more onerous position because of his union activity. We find merit in the Respondent's exceptions to this finding.

Hill was employed as a forklift driver in unit 1 of the Respondent's warehouse. Hill's duties in unit 1 included forklift driving and material handling, because unit 1 had no regularly assigned material handler. Approximately

1 week before the election, which was conducted on 29 October 1982, Hill began to wear union buttons at work. On 29 October Hill was transferred from unit 1, which was close to the polling site, to unit 3. During the first week after his transfer, Hill performed exclusively as a forklift driver, although thereafter he worked primarily as a material handler. Material handling involved manually unloading merchandise from delivery trucks and stacking it on pallets for removal by forklift operators. In unit 3, Hill also substituted for the forklift drivers in their absence.

Hill specifically testified that there was nothing less desirable or more difficult about the work he was required to perform in unit 3 as opposed to his assignments on unit 1, and the evidence

does not establish that the unit 3 work was more physically demanding. When asked what job he preferred, Hill testified that he preferred the unit 1 job, although as a basis for this preference he cited only alleged "harassment" by the unit 3 supervisor, rather than the physical aspects of the job. In this regard, Hill indicated that after his transfer to unit 3, he was closely watched by his supervisor and told that he could no longer punch in at 7 a.m., but had to punch the timeclock between 6:55 and his 7 a.m. starting time. While the timekeeping procedures in unit 3 may have been different from those in unit 1, however, there is no evidence that Hill was subjected to significantly closer supervision or stricter timekeeping procedures than other unit 3 employees.

The judge found that Hill's work in unit 3 was more onerous. In reaching this conclusion the judge relied on his finding that Hill's material handling duties in unit 3 were more physically demanding than his work in unit 1 and on the alleged "harassment" of Hill by his supervisor. Relying on the Respondent's failure to explain the reason for Hill's transfer, the judge concluded that Hill's wearing of union buttons, and the proximity of Hill's unit 1 work station to the election polling site, caused the Respondent to move Hill into the more onerous position in unit 3.[7]

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[7]/ We note that the complaint does not allege that the Respondent discriminatorily transferred Hill in order to remove him from the polling area.

Contrary to the judge, we find that the General Counsel has failed to establish that Hill's duties in unit 3 were more onerous than his duties in unit 1. We note in particular that during his first week in unit 3, Hill performed the same duties he had performed in unit 1, i.e., forklift driving, and that he continued to substitute for absent drivers thereafter. We further note that Hill's duties in unit 1 had often required him to act as a material handler. Thus, while Hill's unit 3 assignments entailed more material handling, the objective evidence and Hill's own evaluation of the work do not demonstrate that they were more onerous than his duties in unit 1.

Moreover, Hill's allegations of "harassment" by his unit 3 supervisor are

not supported by the record. Accordingly, we conclude that the General Counsel has not met its burden of establishing that Hill's working conditions in unit 3 were more onerous than the working conditions in unit 1. Therefore, we shall dismiss this allegation of the complaint.

The judge found that "statements" made by the Respondent's president Paul Baddour during preelection speeches to employees had a coercive effect on employees and violated Section 8(a)(1) of the Act. In his discussion of the speeches, the judge referred to several statements attributed to Baddour, but did not specify which of these statements were unlawful. Because the complaint alleges a violation only with respect to Baddour's statement that the Company is no place for employees who want a union,

we find that this statement alone violated Section 8(a)(1), and we do not pass on the lawfulness of other statements Baddour may have made.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act through Supervisor Charles Smith's interrogation of employee Britton. We disagree, however, with the judge's conclusion that Smith's offer of assistance to Britton constituted a solicitation of grievances in violation of the Act. We note that Smith's offer of assistance was made following his inquiry as to how Britton's daughter was doing. Thus, it appears in context that Smith's statement was an offer of personal assistance and not a solicitation of work-related grievances.

Further, while we agree that the Respondent violated Section 8(a)(1) through its security guards' recording the automobile license numbers of union supporters, we find that the guards' observation of employees handbilling at the gate to the Respondent's premises, an area open to public view, was neither unlawful nor objectionable. In so finding, we distinguish those incidents during which the guards were merely observing the handbilling from those incidents during which they were unlawfully recording license numbers. See generally Hoschton Garment Co., 279 NLRB No. 81 (Apr. 28, 1986).

We also agree with the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act through Supervisor Shelley Smith's remarks to

employee Patrick Amsden. In so doing we note that Smith's comments about the Union were accompanied by a threat to discharge Amsden if he did not stop "talking the union up."

While we agree with the judge that Supervisor Tarver unlawfully interrogated and threatened employee Love, we note that, generally, a supervisor may lawfully express his or her personal views of or experience with unionism. Here, however, although some of Tarver's statements arguably constituted his personal views, the overall context of Tarver's remarks, in our view, is coercive and, accordingly, we find Tarver's conversation with Love to be violative of the Act. Thus, Tarver called Love, who was not shown to be an open or active union adherent, into his office

and began discussing certain personnel matters with him. When Tarver's comments turned to the Union, his "opinions" on unions were accompanied by interrogation as the Respondent's employees' reasons for wanting a union and thinly veiled threats concerning the consequences of unionization at the Respondent.[8]

In agreeing with the judge that the Respondent unlawfully discharged employee David Cordray, we note that the judge credited Cordray's testimony the extent it conflicted with McCollum's testimony. Moreover, even assuming the alleged remark was made by Cordray, we rely on the evidence of disparate treatment of

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[8]/ In agreeing with his colleagues that Tarver's statements violated Section 8(a)(1), Member Stephens relies on the overall context of the campaign and the Respondent's other unfair labor practices.

Cordray and find it unnecessary to pass on the remainder of the judge's rationale.

ORDER

The National Labor Relations Board orders that the Respondent, Baddour, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or giving effect to the invalid no-solicitation/no-distribution rule.

(b) Telling employees that there is no place in the Company for employees who want a union.

(c) Interrogating its employees concerning their protected concerted activities for their mutual aid and protection.

(d) Demoting, warning, or otherwise disciplining employees because they have engaged in union activities or testified before the Board.

(e) Surveiling or creating the impression of surveillance of employees' union activities.

(f) Discharging employees because they have engaged in protected concerted activities with other employees for their mutual aid and protection.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the Policies of the Act.

(a) Offer Larry Mayes, David Cordray, Patrick Amsden, and Jerry Williams immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits, including loss of workmen's compensation pay, suffered as a result of their termination or demotion in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its records any reference to the unlawful discharges, demotions, or warnings of its employees Larry Mayes, David Cordray, Patrick Amsden, and Jerry Williams, and notify them in writing that this has been done

and that evidence of this unlawful conduct will not be used as a basis for future discipline against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices and places of business in Memphis, Tennessee, copies of the attached notice marked "Appendix."[9]

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[9]/ If this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on 29 October 1982 in Case

26-RC-6527 is set aside and that a new election be conducted.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date

and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to

file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. 26 September 1986.

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

C-32

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate, demote, give warnings to, or otherwise discriminate against our employees because of their membership in or because they engage in activities on behalf of the Union or gave testimony before the Board.

WE WILL NOT tell employees that there is no place in the Company for employees who want a union.

WE WILL NOT engage in surveillance or give the impression of surveillance of our employees' union activities.

WE WILL NOT question our employees concerning their union activities, including attendance at union meetings.

WE WILL NOT question employees concerning their sympathy for, and activities on behalf of, Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT give any force or effect to the no-solicitation/no-distribution rule printed in our employee handbook and employee manual.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Larry Mayes, David Cordray, Patrick Amsden, and Jerry Williams, immediate and full reinstatement to, their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole with interest for any loss of earnings and other benefits including loss of workmen's compensation pay resulting from our unlawful discrimination against them.

WE WILL notify each of them that we have removed from our files any reference to his discharge, demotion, or warning and that the discharge, demotion, or warning will not be used against them in any way.

C-34

BADDOUR, INC.

(Employer)

Dated --- By----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower Building, Suite 800, 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901-521-2687.

other benefits including loss of workmen's compensation pay resulting from our unlawful discrimination against them.

WE WILL notify each of them that we have removed from our files any reference to his discharge, demotion, or warning and that the discharge, demotion, or warning will not be used against them in any way.

BADDOUR, INC.

(Employer)

Dated --- By----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any

questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower Building, Suite 800, 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901-521-2687.

88-620 (3)

NO.

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1987

BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME II

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92PP

APPENDIX "D"

JD-408-83
Memphis, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BADDOUR, INC.

Respondent

and

HIGHWAY AND LOCAL MOTOR FREIGHT EMPLOYEES, LOCAL 667, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA — Cases 26-CA-9846, 26-CA-9957, 26-CA-6527

Charging Party

and

ELTON HILL, an Individual — Case 26-CA-9997

Charging Party

and

JERRY LEONARD WILLIAMS, an Individual — Case 26-CA-10121

Charging Party

John Goree, Esq., of Memphis, TN
for the General Counsel
John L. Koelz, Esq., and Duria
Jones, Jr., of Memphis, TN
for the Charging Party
William E. Hester III, Esq.,
and Theresa M. Gallion, Esq.,
(Kullman, Lang, Inman & Bee),
of New Orleans, LA, for the
Respondent.

DECISION

Statement of the Case

GEORGE NORMAN, Administrative Law Judge: This case was tried in Memphis, Tennessee, February 22-25, March 28-31, and April 19-21, 1983. On September 2, 1982, Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union), filed a petition requesting an election among certain employees of Baddour, Inc. (Respondent). On October 29, 1982, the election was conducted which resulted in 125 votes

cast for the Union, 199 cast against the Union, 9 challenged ballots.

The Union filed objections to the election and the Acting Regional Director recommended a hearing on certain of those objections. On August 30, 1982,[1] the Union filed charge No. 26-CA-9846 and an amended charge on October 6. The complaint was issued by the Regional Director of Region 26 on October 6, which complaint was amended on October 19. On October 5, the Union filed charges 26-CA-9957 and 26-CA-9957-2. On December 13, those charges were amended and on December 21, the Regional Director issued a complaint based on those charges and consolidated the matters for hearing.

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[1]/ All dates herein occurred in 1982 unless otherwise stated.

On December 2, Elton Hill filed charge 26-CA-9997 and on December 28, the Acting Regional Director issued a complaint and order consolidating that charge with Case Nos. 26-CA-9846 and 26-CA-9957. On January 18, 1983, the complaint in Case Nos. 26-CA-9846, 9957 and 9997 were consolidated for hearing with the objections in 26-RC-6527.

On March 8, 1983, Jerry L. Williams filed charge No. 26-CA-10121, and on March 16, the Regional Director issued a complaint based on that charge. Thereafter, Counsel for the General Counsel filed a motion to consolidate Case Nos. 26-CA-10121 with 26-CA-9846, 9957, 9997 and 26-RC-6527. Over

Respondent's objections, I ordered the cases consolidated for hearing.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation with an office and place of business in Memphis, Tennessee, engaged in the distribution of consumer goods. Annually, in the course and conduct of its business operations, Respondent sold and shipped from its Memphis, Tennessee, facility, products, goods and materials valued in excess of $50,000 directly to points outside the State of Tennessee. Annually, Respondent, in the course and conduct of

its business operations, purchased and received at its Memphis, Tennessee, facility, products, goods and materials valued in excess of $50,000 directly from points outside the State of Tennessee. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

1. Whether the Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees' union membership, activities and sympathies;

(b) Soliciting employee grievances and impliedly promised to rectify such grievances;

(c) Threatening an employee with more onerous working conditions if the employee supported the Union;

(d) Threatening its employees with plant closure if its employees selected the Union to represent them;

(e) Engaging in numerous acts of surveillance of its employees in order to discover their union activities;

(f) Since on or about April 1, 1982, maintaining an invalid solicitation and distribution rule?

2. Whether David McCollum was a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section

2(13) of the Act during the period of August 16 through 20, 1982?

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Giving a written warning to its employee Larry Mayes;

(b) Discharging its employees Larry Mayes, David Cordray and Patrick Amsden;

(c) Transferring of its employee Jerry Williams to a less desirable position of employment and assignment to a more onerous work task;

(d) Giving a written warning to its employee Jerry Williams and placing him on probation.

4. Whether Respondent violated Section 8(a)11), (3) and (4) of the Act by causing the withdrawal of workmen's compensation benefits from employee Jerry

Williams because he gave testimony in the instant case.

5. Whether Respondent violated Section 8(a)(3) and (1) of the Act by its transfer of employee Elton Hill to a less desirable position of employment and assignment to a more onerous work task.

IV. The Alleged Unfair Labor Practices

Background

Respondent has a distribution center in Memphis, Tennessee. It distributes consumer products, including household items, dry goods, and health and beauty aids, and services discount stores.

The Union Organizing Drive

On August 13, employee Larry Mayes contacted Duria Jones, an organizer for the Union to inquire about organizing the

employees of Respondent. The Union thereafter conducted an organization campaign among the warehouse, maintenance and transportation employees of Respondent at its Memphis facility. The first Union meeting was held on Tuesday, August 17 and the second on August 19.

On Tuesday, August 24, Paul Baddour, Respondent's President, distributed a question and answer leaflet addressed to all of the employees concerning the Union. On September 2, a petition for an election was filed by the Union and a hearing on September 22 resulted in a stipulation for certification upon consent election. The stipulation was approved on the same date, and an election was held on October 29. The

results of the election have already been stated above.

On October 25, Paul Baddour, according to the testimony of employee Elton Hill, gave a speech to 15 employees in a small training room. A few of the employees at the meeting wore, "I Am For Baddour" T-shirts and Hill had Union buttons pinned on his shirt at the time. Hill further testified that Paul Baddour stated at that meeting that he was glad that some of the employees had sense enough to vote for the company, that there are some who don't care for their jobs, and that we don't need people like that working for us. Hill said that about 7 employees including himself wore Union buttons in the plant, including

David Durrough, Anthony Eisworth, Lowell Williams, Anita Neal and Danny Fitch.

Employee Jeffrey Ruffin testified that in mid-September, President Paul Baddour gave a speech to about 20 employees in the plant that lasted about 1 hour. He said that in his speech Paul Baddour had said that the company has no place for anyone, "going to be in the Union, and the Union -- well, all they'll do is take you out on strikes and the strikers, they'll be replaced and the people who are hired to replace you, they could keep your job if they elect to and you'll just be put on the list -- a waiting list".

Employee Kyle Wade Love testified that in late September or mid-October,

the third shift employees were called to a meeting in the small training room. Love testified, "Mr. Paul (Baddour) called us in there on third shift and said he wanted to have a meeting with us and he started showing some slides -- one of them had -- what use to be a house and all that was standing was the chimney. It had been burned down. He said some of this was the violence that can happen during a strike.'' He said that Baddour also told the employees at the meeting that if they need union representation, there was no room for them in the company. Love testified that there was about 60 employees present at that meeting.

Employee Jerry Britton testified that two weeks prior to the election a meeting

was held in the small training room with about 20 or 25 employees present. He testified that Paul Baddour stated there was no place for anyone in this company that wants the Union. Britton testified that Baddour stated that, "if we thought that we needed a Union to represent us, that we were in the wrong place. He said only a few of them, maybe 5 or 10, really wanted a union, but they don't know me very well." Britton testified further that during the week of the election, Baddour gave a speech to the whole plant. He said that there was no place for anyone in the company that wanted a union.

Employee Danny Fitch testified that in mid-October the employees of the first shift were called to a meeting in the

warehouse cafeteria at about 7 a.m. He said all supervisors were present at that meeting, at which Paul Baddour gave a speech. Fitch testified as follows: "The only thing that I can remember out of the speech is that he said that the Union had a bad reputation of burning down houses and blowing up cars and they was mixed in with the mafia and there was no place in the company for people who wanted representation like this".

Baddour testified that he gave speeches to employees on October 25, 26, 27 and 28. He said that the purpose of these meetings was "to set the record straight" in response to attacks leveled on his character by Union propaganda. He said he spoke for approximately 1 hour in each of the six sessions in these three

days. On the first three days he presented to his employees a personal autobiography so they might be aware of his personal accomplishments, his standing in the business community, and the underlining goals towards which he strived on behalf of the company. He mentioned that he had received numerous scholastic and other awards while in high school and college. He received degrees in both law and accounting while in college and he was active in church and civic affairs. He told his employees how important his beliefs in christian doctrine were and that he had written a book concerning these matters which was published throughout the entire United States.

Baddour further testified that at the meetings held on October 25, 26 and 27, he told his audiences that a young female employee of the company who had engaged in handbilling activities on her own behalf, overheard comments made by Duria Jones, the representative of the Union, as he was handbilling on the Union's behalf. Baddour told the assembled employees that she told him that the Union organizer encouraged company employees to attend union meetings and stated that the Union would provide all of the "marijuana, liquor, and naked women, that they might be interested in. Baddour went on to recite that Jones said that if we don't have it we will get it for you." Baddour stated "for the record" that he wanted his employees to be aware that he did not approve of

illicit or unlawful conduct and there was no room for it in the company.

Baddour denied participating in a meeting in which a burned house was shown. He also denied making statements that there is no room for people in the company if they thought they need union representation or that the company has no place for anyone who wanted to be in a union. Baddour also testified that he did not have a written copy of the speech nor did he have any notes. He said that "I only made notes of the accomplishments through my lifetime." He stated further "I do a lot of public speaking and I never make notes." Baddour testified further that the only supervisors present at his meetings were Larry Hunsucker, Don Gibson and George Abraham. He

specifically denied that Leon Weatherford, vice-president, was present during any of his speeches.

Baddour's testimony in that regard was contradicted by Respondent's witnesses Rick Wakefield, department head and Larry Hunsucker who testified that Leon Weatherford attended all meetings at which Paul Baddour spoke.

The evidence shows that Paul Baddour had knowledge of union activity on August 16 and had met with his supervisors concerning union activity. However, he was unable to recall any meetings he had with his supervisors concerning the Union or whether the meetings were held in August, September or October. In addition, he was unable to recall what he

said in those meetings. Respondent also presented employee witnesses who denied that Paul Baddour made the statements alleged in the complaint. [2]

I find that the statements made by President Paul Baddour in his speeches had a coercive effect on the employees thereby affected their Section 7 rights.

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[2]/ The General Counsel's witnesses, Elton Hill, Jeffrey Ruffin, Kyle Wade Love, Jerry Britton and Danny Fitch, were employees of the Respondent at the time they testified. Their testimony was adverse to Respondent and was given at the risk of reprisal including loss of employment. Notwithstanding, each testified in a straightforward, unhesitating and steady manner. I credit them and not Paul Baddour and Respondent's other witnesses who merely denied hearing Paul Baddour make the statements in issue. Job-Right Supermarkets, 231 NLRB 500 (1977); Georgia Rug Mill, 131 NLRB 1304, 308 F.2d 87 (5 Cir. 1962).

Such conduct violates Section 8(a)(1) of the Act.

Respondent's Treatment of Larry Mayes

As previously stated on August 13 employee Larry Mayes contacted Duria Jones, the organizer of the Union, and that contact resulted in the organizational drive at Respondent's plant. Prior to contacting the Union, Mayes had discussions with fellow employees regarding the Union, and after that, he passed out union membership cards during breaks and after work in the employee parking lot. Larry Mayes was employed by the Respondent from April to August 27. He was employed as a general maintenance leadman on the third shift. Each day Mayes' supervisor, Bobby Boyd, left Mayes' work assignment for that

night. As lead person, Mayes oversaw the work of employees Frederick Taylor, Ellie Hibbler, Hubert Waldrip and Lorraine Woods. In addition, Mayes repaired concrete, and did minor carpentry, plumbing (including the repair of faucets) and electrical work.

After the first union meeting on August 17, Mayes was contacted at his home by his supervisor, Bobby Boyd. Boyd asked Mayes how the meeting went. Mayes responded by asking, "What meeting?". Boyd responded, "The Union meeting". Mayes then said "Okay". Boyd then told Mayes that he knew that Mayes started the union campaign. Mayes asked him where he got this information, and Boyd responded, "Well, someone told me". Boyd then asked Mayes how many people were at the meeting

and how many maintenance people were present.

According to Mayes that was the first time that Boyd called Mayes at home. Mayes later discussed his conversation with Boyd with four or five other employees at work that night. In the morning of August 18, Boyd had another conversation with Mayes in Boyd's office to give Boyd a routine report of what was done the night before. When he entered Boyd's office, employee Keith Townley was already there. In the presence of Townley, Boyd asked Mayes how many people had signed union cards and how many people were needed to get a union started. Mayes told him it took 30 percent to have an election.

Employee Keith Townley was called as a witness by Respondent and was asked if on the morning of August 19 he had a conversation with Boyd about the Union in Boyd's office. Townley said that he had. When asked if he was ever present during a discussion concerning the Union between Boyd and Mayes in Boyd's office, he replied that Boyd and he were talking and Mayes came in and "we talked about the Union . . . I believe it was about the Union cards. I'm not really sure." When asked what was said by Boyd and Mayes during that conversation the witness repeatedly responded, "I talked to Bobby several times on the union itself". Again the witness was asked what was said during the conversation and by whom. His response was "We was talking about union cards and Larry Mayes came in and Larry,

he took over and Bob never did ask him any questions at all." He was then asked "What did Larry Mayes say? You say he took over. What did he say?" The witness replied, "He started talking about how many union cards it would take to get the union election." Then the witness responded, when asked what Bobby Boyd said, "Well, you know, he was asking Bobby if he had any dealings with the Union before and Bobby said that he really didn't know what it would take. Then Larry would ask him a question and he would respond." When asked if he recalled anything else being said during the meeting the witness said, "No, I don't." He was then asked if he was in a position to overhear everything Mr. Boyd said while Mr. Mayes was in the room and the witness replied, "No, I left. As far

as I know they were still in there when I left. I don't know. When I left, Larry Mayes was standing up and, you know, a lot of times I have seen Larry tell him a job to do, but as far as hearing Bobby tell him -- ask him about any kind of union deal I never heard him say anything." He was then asked if he heard Bobby Boyd ask Larry Mayes how many employees had signed union cards and the witness said, "No, I didn't''.

I find Keith Townley's testimony to be worthless. He appeared to be previously coached to deny that Boyd asked Mayes any questions whatsoever about the Union during that conversation and the witness, unresponsively and incoherently, kept denying that Boyd asked Mayes any questions about the Union

even though the particular question asked may not have been whether Bobby Boyd questioned Mayes. The witness, who at the time was an employee of Respondent, testified in a guarded and seemingly fearful manner. I credit Larry Mayes who testified in a consistent, candid, straightforward and unhesitant manner. [3]

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[3]/ Respondent investigated Mayes' subsequent and then current employment with Memphis State University and found that he did not state in his application that he had worked for Baddour. Respondent subpoenaed Mayes' application and the custodian thereof from Memphis State University and presented that evidence in an attempt to discredit Larry Mayes. Thereafter, Mayes was recalled (by General Counsel) and testified that after being discharged by Baddour he applied for jobs at several employers and was turned down (apparently blackballed). Mayes said he believed that the reason he was turned down was the fact that he put in his application that he was previously employed by Baddour and, finally, in self defense. did not disclose that fact when he applied for the job which he obtained with Memphis State University. In the circumstances, I conclude that Mayes' actions in that regard were excusable

I find that supervisor Boyd's conduct to be unlawful interrogation in violation of the employee Mayes' Section 7 rights and a violation of Section 8(a)(1) of the Act.

Mayes attended the next union meeting on Thursday, August 19. Later that evening, about 8:45 p.m., Mayes received a call from supervisor Boyd. Boyd asked Mayes how the meeting went; how many people attended; and how many had signed cards. Mayes told Boyd that about 100 to 200 employees attended and that there were "quite a few" cards turned in. Boyd then said that it didn't sound too good.

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inasmuch as his and his family's livelihood were at stake. I credit his testimony.

Mayes told him that it was pretty good for the second union meeting. Boyd told Mayes that he had better be careful. Mayes asked what he meant, and Boyd said, "Just make sure you stay busy."

Mayes reported to work at about 11 p.m., that evening. Upon arriving he found that, contrary to past practice, no written work assignment was left for him that night. He said that as he punched in a supervisor was there. When he started down to the warehouse two supervisors were following him. Mayes said that Boyd always left him a list of work to be performed for that particular evening and that this was the first time that no list was left for him. He said that, inasmuch as he had no assigned duties, he decided to go around checking

expansion joints throughout the warehouse, a job considered to be his "main priority on the third shift". He said he was to make sure that the expansion joints (seams in the concrete) were repaired. As he proceeded around the warehouse checking expansion joints with pencil and pad in hand from 11:30 p.m. to 3:30 a.m. supervisors Lee Bourland and Rick Smith followed him. Mayes said it was obvious they were following him wherever he went. Normally they seldom left their own areas. When they were paged, they didn't have time to answer the page, "for going on along with me".

Mayes said that neither Bourland nor Smith was responsible for supervising him; that on that night shift, there

wasn't anyone present supervising him. He answered to supervisor Bobby Boyd every morning.

Mayes testified that he told Virgil Melton, Fred Taylor and Tyree Cordray about the supervisors following him. When Mayes went to Cordray and Miller's area they stopped and asked Mayes what he was doing and he told them. Mayes then told them that if they waited a minute one of them, supervisor Ricky Smith or supervisor Lee Bourland, would be in the vicinity watching him. Miller then said, "Yes, there he is, right on the other aisle". Cordray then told Mayes that he was being watched by either supervisor Smith or Bourland. Both supervisors carried pads at the time. Mayes further testified that supervisor Larry Hunsuckle

was also following him although Hunsuckle normally works the day shift.

Mayes' testimony was corroborated by witnesses Virgil Melton and Tyree Cordray. Employee Kyle Wade Love also testified that on a night in mid-August he noticed Lee Bourland following Larry Mayes on five or six occasions. He said that every time he saw Larry Mayes go by that night, Bourland would come by a short time after. He said also that he noticed Bourland following Mayes on two or three other nights, "up until the time that he was fired".

Mayes further testified that when he reported to supervisor Boyd at the end of the shift on Friday, August 20, he told Boyd that two people didn't show up and

he had to assign their duties to two other employees. Boyd asked Mayes what he had done that night. Mayes told him that he went around checking the expansion joints and looking for anything else in the warehouse that needed to be done; that inasmuch as Boyd didn't leave a list he didn't know what else to do that night. Boyd told him, "That was good". Boyd then told Mayes of a conversation he had with maintenance supervisor Marvin Highfill. Boyd said that Highfill told him that he knew that Mayes was the one that started, "that union".[4] While Boyd was talking to Mayes, Chris Ramsey, Boyd's immediate supervisor, approached. Boyd, Ramsey,

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[4]/ The warehouse was about a half a mile long and has concrete floors with rubber material between the sections in order to allow for expansion.

and Mayes then went to the seventh floor where Mayes was told about a water line they instructed him to install.

At about 8:15 a.m. Boyd asked and received from Mayes the list of expansion joints that Mayes had prepared the previous night. Mayes was asked to wait outside Boyd's office while Boyd talked to Ramsey. About 5 minutes later Boyd, Ramsey, and Mayes left and went to Director of Maintenance, Marvin Highfill's office. In Highfill's office, Boyd left per Highfill's instructions. Highfill asked Mayes if he liked his job and liked the people he worked with. Mayes told him that he was unhappy about the insurance benefits Respondent was cutting. Highfill then explained, in detail, why the insurance benefit had to

be cut. During the conversation Highfill received a phone call and left. During Highfill's absence, Ramsey told Mayes that when he (Ramsey) was in Florida working for a union contractor the bottom fell out making it tough on everybody who was in the Union. When Highfill returned he told Mayes that he would have to write him up because of his performance the night before. Mayes explained to Highfill that because Boyd did not leave a list he went around checking expansion joints[5] and had to assign employees to the clean-up crew. Highfill told Mayes that he was being given a warning for his poor performance.

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[5]/ At the time, Highfill checked the list of expansion joints prepared by Mayes that was on Highfill's desk.

On Sunday, August 22, Boyd called Hayes at home to inquire about the meeting with Highfill and Ramsey on Friday, August 20. Mayes told Boyd that Highfill gave Mayes a warning for not doing his job. Boyd asked Mayes if he had signed anything and Mayes told him he had not. Mayes also told Boyd that he felt that Highfill was about to fire him until Highfill got the phone call. Boyd told Mayes that Leon Weatherford, vice president of warehouse, prevented Highfill from firing Mayes, and ended the conversation by warning Mayes to look busy.

Mayes further testified that from August 22 through August 27 he noticed first shift supervisors Marvin Highfill, James Cox, Chris Ramsey, Larry Hunsucker

and James Tarver on third shift, wandering around the maintenance area. Mayes' testimony in that regard was corroborated by supervisors Tarver, Cox, Highfill, and Ramsey who stated that on one or two nights during that period they had reported to third shift.

On Friday, August 27, Mayes was called into Marvin Highfill's office in the presence of Highfill and Ramsey. Highfill asked Mayes what he had done that night and Mayes explained that he had been working on a water line most of the night and that he had a problem because they couldn't shut the pressure completely off and had a hard time finding the cut-off valve. Mayes said that because of that he had to pack the water line full of bread in order to

solder it. Highfill then told Mayes that they had reevaluated the situation the previous Friday (August 20) and had decided that it was best for the company if they let him go. Mayes asked Highfill why it took a week to reevaluate the situation and told him that the only reason Highfill didn't fire him the week before was that Leon Weatherford wouldn't let him. Mayes was discharged on August 27.

It is noted that prior to August 20, Mayes had not received a warning concerning his work. Mayes testified that, at the beginning of August, Supervisor Ramsey told him he was doing a great job. Supervisor Ramsey testified that on the night of August 26, he spent an hour looking at a blueprint with Mayes

trying to find the cut-off valve. Ramsey and Mayes could not find the cut-off valve so Ramsey told Mayes to hold off tapping the line until Bobby Boyd came in that morning. Ramsey also testified that not too long after Mayes had gone on third shift (the latter part of June) Mayes had come to see him and that Mayes was a little concerned that he was going to be stuck doing concrete repairs and painting for the rest of his life, "and I explained to him that we just had a backlog and that if he could get -- when he got caught up with that backlog we would go on to the preventive maintenance program that we had on hold, and that from all reports I had, he was doing a good job and continue on and we would move on into the next program".

Mayes' testimony concerning the length of time it took to move the water cooler is corroborated by Respondent's witness Frederick Taylor, a maintenance employee who testified that on the night of August 26, Mayes assisted him in moving a water cooler that night, and that it took about 12 to 13 hours to complete the job. Supervisor Ramsey testified that moving a water cooler would take a man and a helper, about 32 man hours or 2 full working days to complete.

Boyd admitted calling Mayes on August 17 at his home and asking Mayes how the union meeting went. Boyd denies any other mention of the Union in that conversation. He also denies that that was the first time that he called Mayes

at his home. He said he called him many times before to give Mayes work assignments.[6] Boyd denied discussing the Union with Mayes on August 18 in Boyd's office in the presence of Keith Townley but admitted that he had a conversation with Townley and Mayes. His testimony is in contradiction to that of Keith Townley who said that there was a conversation in Boyd's office in which the Union and union cards were discussed.[7] In

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[6]/ I credit Mayes and not Boyd. As previously stated, Mayes was a credible witness. He testified in a calm, candid, consistent and unhesitant manner. Boyd did not.

[7]/ Townley's testimony that Mayes asked Boyd how many cards it would take to get a union election' rather than the other way around is hardly believable. It strains credulity to believe that an employee would ask a supervisor that question, especially an employee who had just attended a union meeting and had initiated the union organization drive.

addition, Boyd admitted that he had a conversation with Mayes after he received his warning on August 20 and that he told Mayes he needed to stay busy. I find that Respondent, on August 17, 18, 19 and 20, engaged in interrogation and created an impression of surveillance of its employee Larry Mayes. Keystone Pretzel Bakery, 242 NLRB 492 (1979); Paul Kossman, 240 NLRB 192 (1979); Crown Zellerbach Corporation, 225 NLRB 911 (1976); Florida Steel Corporation, 224 NLRB 45 (1976).

Concerning the surveillance of Larry Mayes, Supervisor Rick Smith testified that on the night of August 19 he worked the third shift to fill in for another supervisor, Ricky Lee. He said he noticed Larry Mayes at about 11 p.m.

near the break area in unit 1 looking at timecards, and at 11:30 in unit 2 and 3 counting timecards. Smith, however, denies that he was following Mayes at that time. He stated he was merely going in the same direction as Mayes. Smith did not speak to Mayes about Mayes' conduct. Mayes admitted looking at timecards, but only in rack 1, and not racks 2 or 3, for a short time to look for the name of a person. Smith testified that he called Charles Smith, warehouse manager, and told him what he had observed about Mayes. Charles Smith told Rick Smith to further observe Larry Mayes and take notes if he needed to. Rick Smith testified that he observed Mayes from the period 11:30 p.m. to 2:30 a.m. He said he noticed on several occasions that Mayes was not working.

However, Rick Smith admits that he did not know what Mayes' job duties were.

Lee Bourland testified that he had a conversation with Rick Smith that night. He said Rick Smith informed him that Charles Smith had told Rick Smith to take general notes as to where Mayes was seen and what he was doing. Bourland admits that Rick Smith told him to keep an eye on this employee and if he saw him, write down a few notes. Inasmuch as Bourland did not know Mayes, Smith pointed Mayes out to him. Bourland stated that he saw Mayes with a maintenance man, who was cleaning up the bathroom in unit 2, and on other occasions that night he observed Mayes riding his cart or sitting on his cart or talking to other employees. Bourland said that this was the first

time a supervisor in another area was asked to watch or take notes on a particular employee who was not under his supervision. Bourland testified that he later informed Larry Hunsucker that he observed Mayes not doing any work and that Rick Smith had information regarding Mayes.

In a later meeting in Hunsucker's office in which Rick Smith and Lee Bourland were present, Rick Smith read his report concerning Mayes to Hunsucker. Bourland testified that the reason he did not give a report was that he felt Smith's report had adequate information in it to get Mayes fired. When asked why he was observing Mayes, Bourland responded, "To try to get enough to fire him, to prove that this man was not doing

his job -- if I could prove that this man was not doing a job, I would recommend that he be fired. I personally do not make the decision as to that man or any other man who gets fired." When asked why he would have an opinion on that since Mayes didn't work for him and he didn't know what Mayes' job was, the witness said he did not know what his was, "the reason I have an opinion on that is due to I was there observing the man and it was my opinion that the man was not doing anything except riding a cart and talking to other employees and not doing any feasible work.'' When asked how he knew that Mayes' job didn't call for riding a cart and talking to other employees about problems that could have occurred in maintenance, the witness admitted he did not know that. The

witness said, "that's why we were trying to get information to pass on to our superiors so they could check this out". The witness also admitted that he had been employed by Respondent in 1978 and became a supervisor in August 1981 and that in all that time he was never asked to observe and make notes on the performance of an employee who was neither under his supervision nor in his work area; that this was the first time that he was asked to do that.

Larry Hunsucker, director of warehouse operations, normally works on the first shift. He testified that he came to work on the night of August 19 to make himself available for any questions the employees may have concerning the

change of insurance benefits. He said the reason he worked that particular night was that he had a softball tournament in Tulsa, Oklahoma. He said he observed Mayes in unit 2, the picking and stocking area, and on two occasions in unit 3. Hunsucker said he thought it was rather odd for an employee to be riding around in a cart and not doing any work but he did not take any action to talk to Mayes to find out what he was doing. Hunsucker also testified that he had no knowledge of Mayes' job duties. He did not know Mayes was a lead person or that his job required him to talk to other employees.

It is obvious from the testimony of Mayes, Melton, and Amsted, and from the admissions of Respondent's supervisors, that Respondent engaged in surveillance

to discourage Mayes, the leading union adherent, and other employees from engaging in union activity. Two days after the first union meeting and the night of the second meeting the first shift supervisors were reporting to third shift and following Mayes around the warehouse. Knowledge of Mayes' union activities is not in question, especially in view of the conversations he had with supervisor Boyd, including a conversation in which Boyd told Mayes that he knew Mayes was the one that started the Union. Supervisor Tarver admitted that he had a conversation with two other supervisors, Cox and Highfill, prior to Mayes' discharge in which he informed them that Mayes was involved in union activity. At the time, both supervisors said they had

already heard that he was involved in union activity.

Moreover, none of the supervisors who admitted engaging in surveillance of Mayes had knowledge of Mayes' job duties or responsibilities. None was responsible for directly supervising Larry Mayes. None attempted to question Mayes regarding his job duties or his alleged lack of work performance that night. Bourland admitted that the purpose for watching Mayes was to try to get enough information to fire him. Both Hunsucker and Bourland testified to two incidents in which they noticed Mayes, "not performing his work on August 19". In those incidents Mayes could very well have been performing his duties as lead person in the mainterance department.

I find that the surveillance discussed above was coercive and interfered with the employees' Section 7 rights and thereby was in violation of Section 8(a)(1) of the Act. Soundesign Corporation, 232 NLRB 993 (1977); Stoughton Trailers, Inc., 2 NLRB 1203 (1978); Farah Manufacturing Company, Inc., 202 NLRB 666 (1973).

Warning and Discharge of Larry Mayes

Director of Maintenance Highfill testified that he made the decision to give Mayes a warning on August 20. His decision was based on a report purportedly written by Ricky Smith, a warehouse supervisor. The report was dated August 20 and addressed to Charlie

Smith. However, contrary to Highfill's testimony and the face of the report, Ricky Smith testified that he did not write the report; that the report was drafted by Marvin Highfill. Charlie Smith, the addressee, also testified that he had never seen this report. The report described several incidents in which Mayes was talking to other employees the night of August 19. Although the record indicates that several other employees talked to Mayes, Highfill could not recall if those employees received a warning or any other discipline.

Highfill testified that Mayes denied the content of the report and stated that he was working. Highfill admits that only Bobby Boyd, Mayes' immediate

supervisor, gave Mayes work assignments, yet Highfill made no attempt to discuss the report with Boyd or confront Boyd with Mayes' explanation of what he did that night. In fact, Boyd was not involved at all in the decision to give Mayes a warning. Highfill testified that on Friday, August 27, he called Mayes into his office and discharged Mayes, based on a report given to him by supervisor Chris Ramsey. The only supervisors present at Mayes' discharge interview were Chris Ramsey and Highfill. That Respondent had knowledge of Mayes' involvement in the union campaign and engaged in surveillance of Mayes from the period of August 19 through August 27, the date of his discharge, as previously indicated, is not in dispute. It is

curious indeed that on the night that Mayes first noticed that he was being followed, his supervisor failed to leave him a work assignment for that night. Respondent also admits through a supervisor that the reason Mayes was being followed on August 19 was to get enough information on him to terminate him. In other words, he was being "set up". Marvin Highfill, the supervisor who discharged Mayes, admitted that he had no knowledge of Mayes' job duties or responsibilities and made no attempt to involve Mayes' immediate supervisor in either the warning, dated August 20, or the discharge on August 27. Although Highfill denied any knowledge of Mayes' union activity at the time of Mayes' discharge, warehouse supervisor James Tarver testified that in a discussion

with Highfill prior to Mayes discharge he told Highfill that Mayes was involved in the Union. These direct contradictions between supervisors adds to the conviction that Respondent engaged in a deliberate campaign to fire Hayes for his union activity.

The General Counsel has proven by a preponderance of the evidence that Mayes was placed under surveillance, given a warning and later discharged because of his union activity. I find that the warning given Mayes on August 20 and that the discharge on August 27 to be in violation of Section 8(a)(3) and (1) of the Act.

Surveillance of Third Shift Employees

From the period of August 22 through August 27, according to the testimony of several witnesses, first shift supervisors Marvin Highfill, James Cox, Chris Ramsey, Larry Hunsucker, and James Tarver came on third shift from time to time and wandered around the maintenance area.

James Tarver testified that he was in the warehouse on third shift on two occasions during that period. On August 22 he was in the warehouse from 11 p.m. to 1 a.m. He said he came to discuss a problem with another supervisor, James Cox, regarding another employee, Alan Ursery. That conversation lasted only 30 to 40 minutes. Tarver also stated that he reported on third shift at 3:30 on

August 26 to make himself available "to my employees to ask questions about any problems they had with the Union situation going on." Supervisor James Cox testified that he reported on third shift on the morning of August 22 and August 25. He stated that the reason he reported on third shift was to talk to an employee named Al Ursery and to give him a warning concerning work performance. He said that conversation lasted approximately 30 to 45 minutes. Cox also stated that he reported to work on third shift on August 25 at 3 a.m. and left about mid-day just to see how things were going on the shift "and have a little contact with the people." He said that he strolled through the warehouse and made it a point to see all the people.

Marvin Highfill stated that he reported to work Sunday night, August 22, because he wanted to see how things were running and to talk to maintenance employees. Chris Ramsey testified that he was on the third shift on August 26 making third shift inspection. Ramsey also admits that his purpose on third shift was to check on Larry Mayes.

On the night of August 26, Ramsey testified,he noticed Mayes at 3:15 a.m. stopping his bicycle near a break area; taking a pad and pencil and making some notations. He said Mayes then proceeded on his bicycle and although Ramsey admitted he had no idea what Mayes was doing at the time, he took Mayes' actions as breaking early for lunch. Ramsey said he did not question Mayes about his

activity because he was not Mayes' immediate supervisor.

The evidence discussed above convinces me that supervisors Tarver, Cox, Highfill and Ramsey reported to third shift during the period of August 22 through August 27 to check upon the employees of third shift because that is where the suspected union activity and union adherents were located. It is clear from the testimony that each supervisor had prior knowledge of union activity among the employees before they reported to work on third shift. Tarver admits that he was told the night after the first union meeting by employees Keith Townley, Mike Bishop, and Alfred Oglesby that there had been a union

meeting. Tarver said he discussed this information with Marvin Highfill and James Cox. Tarver also stated he had a discussion with these two supervisors concerning Larry Mayes' involvement in the union campaign. Ramsey states he heard "some scuttlebutt" that there was talk of union activity the week of August 16. Cox testified it was reported to him by Jim Tarver that employees were passing out cards. Both Tarver and Cox testified that they reported on their shift to talk to an employee, Alan Ursery. Neither supervisor explained satisfactorily why he did not wait until first shift to speak to Ursery or why they did not report to work a few minutes early on their own shift in order to talk to Ursery.

Tarver, Cox, Highfill and Ramsey all admit that they reported to third shift to check up on that shift. This admission, considering the timing of their visits, strongly suggest their purpose was motivated by the on-going union campaign.

The Discharge of Employee David Cordray

David Cordray was an employee of Respondent from June 1981 until August 20, 1982. He worked on the third shift as a forklift driver and his immediate supervisor was Walter Webb, but during the week of August 16 through 20, David McCollum was acting supervisor in place of Webb.[8]

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[8]/ Walter Webb was a third shift supervisor over approximately 10 employees and although he does not have the authority to hire employees, he has the authority to recommend discharge.

On Monday, August 16, Cordray was informed by Larry Mayes about the union meeting to be held on August 17. On that same Monday, Cordray asked acting supervisor McCullom if he was planning to attend the union meeting. McCullom responded that he might. Cordray attended the meeting on August 17, signed a union membership card and took blank union membership cards home with him that

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Webb's duties are to plan work, assign work, give instructions and generally oversee the operations and initials employee timecards. In supervisor Webb's absence, McCullom performed Webb's duties. McCullom's regular job title is "Department Head." There is no dispute that during the week of August 16, McCullom was acting supervisor performing the duties of supervisor Walter Webb who was on sick leave during that time. I find that McCullom was a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act during the week of August 16.

night. Cordray also placed a Teamster bumper sticker on his car before he reported to work that night. When he arrived at work he noticed a bumper sticker on employee Pat Amsden's car which was parked next to Cordray's car.[9] Neither Cordray nor Amsden saw bumper stickers on any other cars that night. In addition to the above, Cordray's union activity consisted of passing out union cards in the Respondent's parking lot during the period August 17 through 20.

Respondent's parking lot is fenced in and scanned by video cameras on a 24-hour basis. The cameras have sufficient power

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9/ Cordray's testimony was corroborated by Pat Amsden who testified that there was a Union bumper sticker on his car that night and he saw a similar bumper sticker on Cordray's car.

to allow identification of individuals while in the parking lot. It is also established that Respondent issued identification stickers to its employees to be placed on the bumpers of their cars, thus permitting identification of the owner of any car in the parking lot by the cameras or otherwise.

Another Union meeting was held on August 19. On Wednesday, August 18, Cordray asked McCullom if he was planning to attend that meeting the following day. McCullom responded that he was not going to the meeting; that he didn't want any part of the union and, that the union was bad for the company. McCullom denied both the August 16 and August 18 conversations with Cordray.

On Thursday morning, August 19, all third shift employees attended a meeting at the plant. After the meeting, Cordray went to his work area to put away his belongings and then headed for the time clock to punch out. At that point, acting supervisor McCullom walked up to Cordray and stated, "Might need you to work overtime until 9:00. Can you work?" Cordray testified that he responded by saying, "No, I can't work today". Cordray then left the plant without anymore having been said by either McCullom or him. The conversation took place at about 8 a.m.

McCullom testified that he had asked Cordray if he could work overtime and Cordray replied, "Fuck it. I am leaving".

The next morning at about 7:15 a.m., Cordray was called into supervisor Mike Bond's office. Cordray gave Bond his version of what happened concerning the request to work overtime. Bond then told Cordray what McCullom said Cordray's response was. Cordray was then told to go back to work and as he was leaving Bond's office, Eason Camp, manager of picking and stocking, came by and told Cordray to go back to Bond's office. While in Bond's office, Cordray repeated to Eason Camp and Bond his version of what had happened the day before.

McCollum then appeared and told his version of what happened. Camp then asked McCollum if he was sure that that was what Cordray said. McCollum stated

that, "he wasn't sure and that he could have misunderstood". Camp stated, "You have to be sure for anything to be done". McCollum then said he was sure Cordray said it. (That was according to Cordray's testimony).

During that meeting Cordray was discharged for insubordination. Cordray's position was that he did not use profanity and that on many occasions he told McCollum that he could not work overtime when asked with impunity. Cordray said that the reason that he could not work overtime was that he had promised a friend that he would help him run his father's junk yard. Concerning that incident, former employee Dennis Gray testified that he heard Cordray tell McCollum that he "wasn't going to be able

to work overtime today". He further testified that he did not hear any reply. Gray said the remarks were made in a normal tone of voice and that the conversation took place about 10 to 15 feet away from where he was standing. He said he heard no profanity during the conversation.

In his testimony, McCollum denied telling Camp that he was' not sure what Cordray said. Respondent's position is that the reason for Cordray's discharge was for the remark he made to McCollum and not for refusing to work overtime. In that connection, it is noted that McCollum testified that he did not take the alleged comment made by Cordray as a remark directed at him personally. McCollum also testified when asked

whether working overtime was mandatory or voluntary on the part of the employees that he was never informed as to whether it was mandatory or voluntary. When asked whether he asked Cordray to work overtime in the past he said that he had and that Cordray had agreed to work overtime on some occasions and that on other occasions he "might have had something to do". Cordray could not remember any specific occasion that Cordray had not worked overtime when asked. McCollum said that Cordray did not say anything else in the conversation except what was stated above. McCollum was asked:

> "Q. Did you take that as a personal remark?
>
> A. No sir. Not really.

> Q. Now, it could have been stated, "You" instead of "It'', and then you would have taken it personally, I take it. Is that right?
>
> A. Yeah. If he had said "You", I would have."

McCollum testified that he knew of no other employee who had been discharged for making a similar comment and also testified that he did not know that Cordray would be discharged for making the remark that he allegedly made.

The General Counsel adduced evidence of other employees who used similar language in conversations with their supervisors and cases of insubordination in which the employees concerned merely received warnings but were not discharged.

Assuming arguendo, that Cordray did make that remark when asked to work overtime, admittedly, the remark was not directed at acting supervisor Cordray personally. At most,it was an expression of disgust because,at the time,he had made other plans. Considering the circumstances of the employee at the time (a commitment to help a friend) and the testimony of McCollum that he did not take the remark personally, I find it inconceivable that he would be fired for such a remark. McCollum's testimony that he did not know that Cordray would be fired for making the remark and Respondent's policy that working overtime is voluntary, not mandatory; and Respondent's contention that McCollum is not a supervisor, therefore, the remark was made to a fellow rank and file

employee; and considering the video cameras scanning the parking lot on a 24-hour basis wherein employees' cars (including those with union bumper stickers) can be identified by the company issued permits also on the bumper,[10] I am convinced that Respondent knew of Cordray's union activity and that the reasons given for discharging Cordray are pretextual. Respondent's discharge of David Cordray is a violation of Section 8(a)(3) and (1) of the Act.

10/ Not only did Cordray have a union bumper sticker on his car as well as the company assigned identification sticker, but he also passed out union membership cards to fellow employees in the parking lot in full view of Respondent's video cameras. Moreover, McCollum's testimony was not given candidly. He was nervous and hesitant. Cordray was straightforward and unhesitant. I credit Cordray.

The Discharge of Patrick Amsden

Patrick Amsden was employed by Respondent from August 27, 1978, until August 25, 1982. Before his discharge he was employed as a department clerk. As department clerk he checked in goods received in the receiving department and filled out maintenance forms. He also checked inventory accounts and made sure they corresponded with the computer print out. Immediately before his discharge Amsden worked the third shift, 11:30 to 8 a.m., for about two and a half years. His immediate supervisor was Ron Gatlin.

On August 17, Amsden was informed by fellow employee Larry Mayes of a union meeting scheduled for that day. Amsden attended the meeting and signed a union membership card. While there, Amsden

picked up blank union cards and a Teamster bumper sticker. From August 17 until his discharge, Amsden passed out union membership cards in the Respondent's parking lot before and after work. On the night of August 17, Amsden placed a union bumper sticker on his car before going to work. As previously stated, Amsden also noticed a bumper sticker on David Cordray's car in the parking lot next to his car.

On August 23, at 1 a.m., Amsden was working with another employee checking goods in. They were having a casual conversation while working. Ron Gatlin approached Amsden and told him that soliciting during work time was not allowed and he could get fired for it. Amsden responded that he did not know

what Gatlin was talking about. Gatlin then stated, "I don't want to see you get fired".[11]

Later that day at about 7 a.m., Amsden was summoned to area manager Shelley Smith's office. Upon arriving at Smith's office, only Smith was present. Smith told Amsden that he had heard some talk about a union out in the warehouse. Amsden said that he, also, had heard of such talk. Smith then told Amsden that the company could not function with the Union; they had to stay price competitive; and if the Union got in the company would have to pay higher wages and it could not afford it. Smith then told Amsden, "Look at International

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11/ Gatlin denied this conversation took place.

Harvester or Firestone. Those employees got a union, but they are out of a job. The Union didn't do them any good". Smith then said the company had borrowed some money and was having to pay high interest rates and that is why it wasn't giving the employees any raises and was having to cut back on benefits. Amsden asked Smith how he was going to survive without an increase in pay. Smith told him he had not received a raise for two years. Smith then told Amsden that he did not have to remind Amsden about his lateness situation. Smith then told him that in the future they would be keeping an eye on his tardiness and there wouldn't be anything he could do to help himself. Smith also told him that if he didn't quit "talking the union up" that they would find a reason to fire him.

Then he told Amsden that he should get a hair cut and try to wear better clothes to work. Amsden responded that he would get his hair cut. That conversation lasted about 30 or 40 minutes.[12]

Smith admits that Amsden was called into his office to have a conversation. Smith said that the conversation lasted only 5 to 10 minutes. He only told Amsden to cut his hair and to try to clean up his appearance. Smith also admits talking to Amsden about his attendance. Smith also testified that he had known Amsden for about 5 years and in that time there was no indication that he wasn't honest. He said he had no reason

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[12]/ Amsden was tardy three times during the previous six months.

to disbelieve him because he had never caught Amsden in a lie.

On the night of August 23, Amsden reported to work at 11:30 p.m. and while working he noticed Mike Bond, a supervisor, standing a couple of aisles away from him watching him. Amsden said, "Hi" to Bond. About three or four times that night, Amsden noticed Bond was just standing a couple of aisles away (about 15 feet) watching him. At about 4:05 a.m., employee Virgil Melton told Amsden that Mike Bond was watching him and Amsden ought to be careful. At about 4:30 a.m. that day, Amsden was sitting on his forklift leaning to his right looking at his clip board. He had checked some locations the day before and he was going over his notes to make sure the right

number of cases of goods were in the right locations. Amsden said that, around that time, he looked up and saw Virgil Melton pass by. Melton had whistled while passing and Amsden nodded his head to acknowledge his presence. Amsden then directed his attention back to his clip board and when he looked up again he saw Mike Bond standing to his left in front of his forklift. Bond asked Amsden "Are you having trouble keeping your eyes open?" Amsden responded, "O don't know what you're talking about. I am reading off of my clip board". Bond again asked, "Are you having trouble keeping your eyes open?" Amsden again responded, "I don't know what you're talking about. I am reading off my clip board". Bond then walked over to a phone and made a call. Amsden

testified that he did not see Bond approach him because Amsden was looking down to his right at his clip board when Bond walked up to his left. At the time, the forklift was running and made a slight noise.[13]

Shortly after the above incident, Amsden hurt his finger. He went to the emergency clinic late that night and reported back to work that morning at about 9 a.m., and clocked out.

Amsden's testimony is corroborated by Virgil Melton, also a forklift driver on

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13/ The forklift has an electric motor and a foot accelerator. If a person fell asleep while the motor was running it would be dangerous if his foot accidentally touched the accelerator.

third shift supervised by Ron Gatlin. Melton stated that he noticed Mike Bond walking around and following Amsden. Melton also testified that later that afternoon, Ed Yoches, an employee, told Melton to stay away from Amsden because they were setting him up to fire him and, later that morning, Melton warned Amsden to be careful, that they were trying to set him up.

At about 5 a.m., Melton was riding through the warehouse. He passed Amsden in one of the side aisles and whistled and waved, thus corroborating Amsden's testimony. Melton said Amsden looked up and nodded his head and went back to writing on his clip board. Melton said that he had goods that he had to place in the next aisle and as he was backing his

forklift into that aisle, he noticed Bond cross from the main aisle. Bond was about 20 feet up the side aisle. Melton then placed his goods down and came out of the other end of the aisle. When he drove past the aisle in which he saw Amsden he noticed Mike Bond standing next to Amsden and that Amsden had straightened up on his lift and had his arms crossed. Melton said that it was about 30 seconds to a minute from the time he saw Mike Bond and the time he placed his goods in location and drove pass Amsden again. According to Melton's testimony, Bond could not have been standing next to Amsden for more than 30 seconds.

Employee Virgil Melton testified that he went to the supervisor's desk that

evening to deliver some bills of lading and Amsden was there, "He had hurt his finger and he told me he was getting ready to go to the doctor and told me that Mike (Bond) had accused him of sleeping and I asked him, Was it when I come by and whistled at him, and he said, Yeah, and I said, Well -- I told him he didn't have nothing to worry about because he wasn't sleeping. So, you know, don't be worried. I seen him". Melton further testified that later that morning he had a conversation with his supervisor, Ron Gatlin. Melton said, "I asked him, you know I heard from some more employees that he was fixing to be fired." He said that Gatlin responded that he didn't know "that Mike said he was asleep". Melton responded, "Yeah, and I said, well, I went by there and he

wasn't asleep then and if Mike said he was asleep that he was a damn lie". He said that supervisor Gatlin had told him that Bond had watched Amsden about 3 minutes. He then said that Gatlin didn't say anything else and, "I was just mad and got on my lift and rode off, and went back to work".

Mike Bond testified that he was working third shift on the night of August 24 and his purpose for being on third shift was that he was filling in for a supervisor, Walter Webb, who had his wisdom tooth extracted the week before.[14]

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[14]/ It is noted that Bond also testified that David McCollum, the department head, takes over Webb's job responsibilities when Webb is absent from work. That was also admitted by Respondent's supervisor Eason Camp. No

Bond denied that he watched or followed Amsden on the night of August 24. He stated that he found Amsden around 4:25 a.m., sometime in that time range, asleep on a forklift. According to Bond he walked up to Amsden to speak to him and Amsden was sitting on his lift with his eyes closed and his head was bobbing. Bond testified that he stopped and stared at Pat Amsden. He had never stopped and stared at him at any other time.

Lunch for that shift was over at 4:05 a.m. at which time the buzzer went off and everybody went back to work. He said

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explanation was given why Bond and not McCollum was filling in for Webb as had been the practice.

that around 4:25 or 4:30, "somewhere in that time, anywhere from 15 to 25 minutes after the employees went back to work following the lunch break" he noticed a lift sitting approximately 3 or 4 bays into the aisle off to the left side of that aisle. Bond testified, "and like I said, when I walked through I normally speak to everybody that I see and I looked up and I was going to speak and Pat Amsden was sitting on his lift and his eyes were closed and his head was bobbing and so I didn't speak. I just stood there approximately about 2 minutes or so and then I walked up to the lift and his eyes were still closed. I could see his eyes and his head was still bobbing. And his head got to bobbing more and I walked up to the lift and stood there approximately another minute

or two, a total of around 3 or 5 minutes watching him and his eyes were still closed. His head started bobbing violently and at one time it -- when it dropped, his eyes kind of opened up and I could see him catch my image from the corners of his eyes and at that time he rolled his head back to the right away from me and started looking down at the clip board next to him and I asked him, I said, 'Pat, what are you doing?' and he said, 'checking some locations' and I walked around to the back side of the lift and asked him, I didn't ask him at that time, I looked at the clip board to see if there was something there you know, for him to generate that type answer, and he had some receiving reports there and I asked him, you know Pat, you know, weren't you asleep? and he said, I

was 'checking some locations'. That's all he would say. And at that time I turned around and walked over to the phone which is about a aisle over and paged the supervisor, Ron Gatlin, and reported the incident to him and told him, you know, I would get a written memo to Shelley (Smith) which is Ron Gatlin's boss on this which I have just seen." Contrary to the testimony of Amsden and Melton, Bond testified that at the time, the forklift was not running. When questioned how long he observed Mr. Amsden asleep, Bond repeated that it was "3 to 5 minutes".

It is hardly credible that Bond saw the forklift, saw Amsden on it, went there to greet him, found him asleep and stood there 3 to 5 minutes observing him

without saying a word until Amsden, on his own, awakened. In addition, it is peculiar that Bond was filling in for supervisor Webb at the time with no explanation as to why McCollum, who usually filled in for Webb, was not filling in for him. Moreover, Respondent presented two employee witnesses, Ed Yoches and Mike Ward who testified that they were in the area at the time Bond allegedly caught Amsden asleep. Both witnesses stated that they did not know whether Amsden was asleep or not, only that he appeared to be sleeping. It is also noted that both Yoches and Ward testified that Amsden was a friend of theirs, yet, when they saw Amsden, if indeed they thought he was asleep, neither made an attempt to wake him. Yoches said, at the time of Amsden's

discharge, August 25, he had no knowledge or even rumors of union activity. Yet, President Baddour addressed a memo to all employees dated August 24, concerning the Teamsters union.

As previously stated, supervisor Shelley Smith in a conversation with Amsden informed him the company could not function with a union and that unionized employees of Firestone and Harvester were now out of a job. Smith further said the company could not afford the Union and the Union would not do any good. Smith also threatened Amsden with discharge if he continued to talk up the union. I find that the purpose of Smith's statements was to coerce and discourage Amsden regarding his union activity, and therefore in violation of Section 8(a)(1)

of the Act. Amsden testified in a forthright, clear, detailed and consistent manner. Smith, on the other hand, was vague, incomplete and often evasive in his testimony.

Both Amsden and Melton testified in a calm, controlled and direct manner, that they noticed Mike Bond, a first shift supervisor working on third shift at the time, watching Amsden. I am convinced from the evidence adduced that Bond's purpose for reporting to third shift was to watch the union activities of the third shift employees, including known union adherent, Pat Amsden.[15]

15/ Bond testified in a shifty and nervous manner. He was not credible.

88-620
NO.

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1987

BADDOUR, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VOLUME III

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I am convinced that Respondent discharged Pat Amsden because of his activities on behalf of the Union. Amsden's denial of sleeping on the job was corroborated by Virgil Melton who testified in a clear, concise and detailed manner. He stated that Amsden was not asleep and that he told his immediate supervisor Ron Gatlin, who testified that Melton told him that Amsden was not asleep at the time Bond states he saw him sleeping. Although supervisor Camp and Smith had knowledge of Melton's statement prior to the discharge, neither made an attempt to contact Melton to shed light on the conflicting versions of what happened that night. In addition to it being very unlikely that an employee would be asleep in a visible area of the warehouse after

being warned that he was being set up and aware that he was being watched because of his union activity, would be asleep, and at such a short time after lunch break, which ended at 4:05 a.m.

In all the circumstances, including the timing of the discharge, the Union animus displayed by Respondent and the credible evidence of record, I find that Respondent's reasons for the discharge of Pat Amsden were pretextual and that he was discharged because of his union activity, in violation of Section 8(a)(3) and (1) of the Act.

Warning and Transfer of Employee Williams

Employee Jerry Leonard Williams was employed as a cart control person. His immediate supervisor was Greg Taylor.

His duties as cart control person were to monitor the operations of the tow rail and balance cart availability. He also checked for proper usage of those facilities and reported any mechanical problems. Williams' job duties required him at times to ride a bicycle. In performing his job Williams had access to the entire warehouse.

On September 22, Williams was subpoenaed by the Union to appear before the Board at a representation hearing and on that date, he gave the subpoena to his supervisor, Greg Taylor. After the hearing on September 22, Taylor approached Williams and showed him the Teamster by-laws and constitution and stated that Williams could be fined and assessed by the Union. He also told

Williams that if the Union goes on strike in New York, that he could have money assessed out of his check. Williams told Taylor that he wasn't interested and that he wanted union representation.

On October 13, Williams was taken out of the cart control position and placed in the consolidator department and given the position of consolidator. His duties as consolidator were to lift mail totes off the conveyor belt and place them in empty carts to send to shipping. A consolidator must lift the mail totes that weigh up to 150 pounds by hand. After the transfer, Greg Taylor continued to be Williams supervisor.

A few days before his transfer to consolidator, Williams was riding his

bicycle in shipping when employee Michael Stokes told Williams that his (Stokes) supervisor, Mike Smith, was asking him what went on at the union meeting the night before. Upon hearing that, Williams went to his supervisor, Greg Taylor, and told him that if supervisor Mike Smith asks another question about the Union that Williams would file charges against him through the Teamsters union. Taylor told Williams that he would relay the message to supervisor Smith.

After the transfer, Williams was told by supervisor Taylor to stay in unit 1. Williams was not allowed to go around the plant or go back to his position as cart control person. Williams remained at the consolidator position until he hurt his

back lifting a mail tote on November 9. At the time of Williams' transfer to consolidator there were two full-time consolidators, Steve Dodds and William Davis. Since Williams' transfer, Dodds has worked the consolidator position only part-time.

Eason Camp, manager of picking and stocking, testified that he made the decision to transfer Williams from the position of cart controller to consolidator on the morning of October 13, the day Williams was transferred. He testified that the transfer was made because of an increase in demand of, "the work at the consolidator job". Camp testified that he did not supervise the cart control area nor did he directly supervise the consolidator area.

However, he said that his responsibilities were to coordinate the whole picking and stocking area. He said that he does not generally transfer people into the consolidator position and he could not recall any hourly employee besides Williams that he had moved from another area to the consolidator area.

A few days after Williams was transferred to the consolidator position, he hurt his hand and was unable to do consolidator work so he was given the duties of housekeeper in the consolidator area. When asked why he didn't place Williams back in cart control, Camp testified that it did not enter his mind but that he did make the decision to keep Williams in the consolidator area as a housekeeper.

Camp admitted that as consolidator, Williams was limited to one specific area of the warehouse and that although it usually takes a week to train an employee in consolidator position, Camp stated that to his knowledge Williams had not worked the position of consolidator prior to his transfer. He said he knew of other employees who had worked the position of consolidator prior to Williams' transfer, but he chose not to place them back into the consolidator position. Camp said he knew employee John Anderson had been working in the consolidator position prior to Williams' transfer but he did not know exactly what Anderson was doing that week without checking the record. He said he was either filling orders or stocking. Camp

said he did not choose to take Anderson and put him back into the consolidator position but did not explain why.

Although Respondent offered a list of floaters used in unit 1 during the period before Williams' transfer, the document was apparently introduced to show the increase work load in unit 1. However, the document also shows a decrease in the use of floaters in unit 1 after Williams' transfer. Camp testified that the purpose of having floaters as well as temporary employees available was to use them interchangeably. However, not one floater or temporary employee worked the position of consolidator during the period of Williams' transfer. Temporary employees were used in the consolidator position prior to Williams' transfer.

When asked why a temporary employee or floater was not used for the consolidator position instead of transferring Williams, Camp responded, "They don't know how to do anything, any job that we have, they have to be trained . . . . we do not realize an immediate benefit from a temporary employee".

The Handbilling Incident

On October 14, Williams requested a vacation day off and was granted it by his supervisor, Greg Taylor. At 3:45 p.m. on his day off, Williams handbilled on behalf of the Union outside the gate. As Williams was handbilling, Taylor, with his wife at his side, approached Williams and told him he could not handbill. Williams responded that he had taken a vacation day and that he could do

anything he wished. Taylor then told Williams that he could not distribute handbills on behalf of the Union and that he would have to leave. Again, Williams reminded Taylor it was his vacation day. Taylor insisted on Williams leaving. Williams then called 'Shorty', another handbiller, to assist him. Taylor then left as Shorty was walking towards him.[16]

Taylor admits that he had a conversation with Williams at the gate while Williams was handbilling but said that Williams approached his truck and initiated the conversation. Taylor

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16/ Williams' testimony was corroborated by employee Jeffrey Pope who was also handbilling at the time of the incident. Pope testified that he saw Taylor talking to Williams while Williams was handbilling and that when Williams called Shorty over, Taylor left.

denied mentioning handbilling during the conversation. He said he asked Williams if he brought a doctor's excuse because Williams had led him to believe that he had been sick. Taylor also denied that Williams called Shorty over to where they were talking. Taylor admitted, however, that he backed up his truck and went back to Respondent to report the incident. He said he wanted to report the incident because he was apprehensive of bodily harm being inflicted upon him because Williams indicated that he was going to get Shorty. Taylor said that because his wife was in the truck he felt like he needed to report the incident. Notwithstanding, Taylor's alleged concern for bodily injury to him or his wife, a few minutes later, Taylor permitted his

wife to drive through the gate alone while he remained in the plant.

Taylor denies any knowledge of Williams' union activity prior to Williams' handbilling on October 14. He also denied that Williams gave him a subpoena in September so that he could be out of work to attend the NLRB hearing. Williams testified that he gave the subpoena to Taylor on the morning of September 22.[17]

17/ Because of the corroboration of Williams' version of what took place during the handbilling incident and because of Williams' calmed, controlled, and confident demeanor while testifying and inasmuch as his testimony was given without hesitation and without even a hint of evasiveness, I credit Williams and not Taylor who testified in a guarded and hesitant manner with several memory lapses.

Williams' 90-days' Probation for Unexcused Absence

On November 8 at about 7:30 a.m., Williams called the plant and told supervisor Taylor he had car trouble and that he would try to get to work as soon as he could. At about 9:30 a.m., Williams called Taylor and informed him that the timing chain on his car was malfunctioning and that he would be there as soon as he could. At 2:30 p.m., Williams again called the plant but Taylor was unavailable. Williams spoke to Rick Wakefield, the department head. Williams told Wakefield that he was unable to get his car fixed and he could not report to work because he had no means of transportation. Williams also told Wakefield that he would be in on the next day and bring a receipt for the car

repairs. On the following day, supervisor Taylor accompanied Williams to his office where Wayne Street, a supervisor, was waiting. Williams was then placed on 90-days probation for an unexcused absence.

In February, prior to the October incident discussed above, Williams was given a personal absence (excused) after calling supervisor Taylor that he had car trouble and would try to be in as soon as the car was repaired. Williams could not make it to work that day either. However, he did not get a warning but rather a personal absence or an excused absence. In that connection, employees Jerry Britton and Virgil Melton testified concerning days that they missed work because of car trouble and neither was

given a warning. Each absence was treated as an excused absence.

Supervisor Taylor testified that Williams received discipline because the absence was his fourth and only the first occurrence of car trouble permits an excused absence. However, contrary to supervisor Taylor's testimony, Williams personnel file reveals that he had been given several excused absences for car trouble.

Rick Wakefield, department head, testified that whenever he had a problem, he would call in the same morning and request a vacation day and the request was granted.

Williams is Cut Off from Workmen's Compensation Pay

Williams was injured on the job on November 9, and on November 24, began receiving workmen's compensation pay from Liberty Mutual Insurance Company. Since that date he had been receiving a check every two weeks.

On February 22, during his testimony in the instant proceeding, Williams was questioned concerning the use of the name "Lowell" Williams which was not his first name. Williams said that his brother Lowell filled out the employment application and submitted it to Respondent but when the job became available his brother had already found another job so Jerry Williams went in for the job interview. Jerry Williams was

hired in his brother's place on the strength of his brother's job application. He was hired as "Lowell", using his brother's name and Social Security number, on October 6, 1980.

In February 1981, Williams told supervisor Eason Camp that his brother Lowell had filled out the application, but that he, "Jerry", was interviewed and hired and that he was then using his brother Lowell's name and Social Security number. Upon receiving the true story, instead of straightening out the records at that time, Williams' Social Security number was changed from his brother's number to his (Jerry's) number. But the name "Lowell" remained in his personnel file unchanged and Jerry continued to be known as "Lowell" Williams without

objection from Respondent. Eason Camp corroborated Williams' testimony that Jerry Williams did tell him, in February 1981, that his brother Lowell had filled out the application and that he, Jerry. was interviewed for the job. Williams' personnel file reflects the change in Social Security numbers, as of February 1981.

On March 2, 1982, Williams called Liberty Mutual Insurance Company because he did not get his Workmen's Compensation check. He was told that a representative of Respondent had called and said that he had used fraud on the company. Williams then called Fred Stearns, the personnel manager of Respondent, and Stearns told Williams that he had used fraud against the company. Daniel Jenkins, claims

manager of Liberty Mutual, testified that on February 25, 1983, his office was contacted by Respondent regarding a possible discrepancy in signature on a claim that had been reported to them as the individual named Lowell Williams, as a result, Williams' benefits were cut off.

Fred Stearns testified he did talk to Dan Jenkins of Liberty Mutual and told him that he had found out that the person who was drawing the workmen's compensation under the name "Lowell" Williams was actually another person. He gave him the name but he denied telling Jenkins to cut off Williams benefits. He said that he waited to inform Liberty Mutual after Williams testified because, before the hearing, he did not know that

Lowell Williams was actually Jerry Williams. He also denied he had a desire or plan to retaliate against Mr. Williams for testifying at the hearing. Stearns testified, however, that he was aware of the fact that the Social Security number had been changed from that of Lowell Williams to Jerry Williams. Stearns also denied telling Williams that when he called Liberty Mutual he told them that he had used fraud against the company.

I credit Williams who, although when sworn, testified as Lowell Williams rather than Jerry Williams, reported the true facts to Respondent on his own in February 1981, less than 4 months after he was hired (Williams is still an employee of Respondent). Respondent is responsible in view of the February 1981

disclosure by Jerry Williams for Williams remaining on the job and being identified as "Lowell" Williams instead of Jerry Williams and given paychecks naming "Lowell" Williams. Even though Respondent was notified it did not change Williams' personnel records or recognize or pay him under his proper name. Respondent condoned Williams' use of the name "Lowell" Williams. Therefore, I do not hold Jerry Williams responsible for continuing under the name "Lowell" rather than his own name while at work.

I find also that Respondent is responsible for the insurance carrier processing the workman's compensation claim for "Lowell" Williams and making the checks out to "Lowell" Williams. I do not consider Jerry Williams as having

created any fraud against Liberty Mutual or Respondent. Williams received compensation checks that he was entitled to, albeit under the name "Lowell". In the circumstances, Respondent did not act in good faith towards its employee Jerry Williams by causing a cessation of his workmen's compensation pay. I find that Respondent's act was malicious and in retaliation for Williams' appearing and testifying on behalf of the General Counsel in this matter. I credit Williams' version and not Stearns' version of the facts.

As previously stated, I credit Williams and not Taylor with respect to the alleged interrogation of Williams' union activity in violation of Section 8(a)(1) of the Act. I find that Taylor

was aware of Williams' union activity prior to October 14. Williams was subpoenaed by the Union to testify at the Board hearing on September 22, and Williams handed the subpoena to his supervisor, Taylor, in order to be excused to attend the hearing.

I also find that Williams was discriminatorily transferred to a more onerous job because of his union activity and in order to isolate him in a job requiring him to remain in one area of the warehouse. Camp's testimony was rife with inconsistencies and lacking in plausible explanations for transferring Williams rather transferring other employees who either had been trained for the consolidator job or temporary employees or floaters who were

specifically employed for such emergencies. Camp was evasive and nervous while testifying. Moreover, it is significant that no other employee was placed in the consolidator position on a steady basis to replace him after Williams left when he hurt his back.

The timing of the transfer, October 13, two weeks prior to the election, reveals that Respondent sought to take a known union adherent out of the main stream of the warehouse and place him in a more onerous job restricting him to a specific location, in violation of Section 8(a)(3) and (1) of the Act.

Based on the testimony of employees Williams, Melton and Britton, all previously discussed herein, Respondent's

policy was to give an excused absence if an employee missed work because of car trouble. Indeed, Respondent's own witness, Rick Wakefield, testified that on occasion he would call in on the same morning and request a day off and would be allowed either a day without pay or a vacation day without any adverse consequences. The conclusion is unavoidable, and I so conclude, that Respondent gave Williams a warning and placed him on probation because of his union activity, in violation of Section 8(a)(3) and (1) of the Act.

I also find that Taylor's conduct at the gate while Williams was handbilling was a violation of Section 8(a)(1) of the Act. Respondent's conduct against Williams for giving testimony in a Board

proceeding is a violation of Section 8(a)(1), (3) and (4) of the Act. Pickle Bill's Inc., 224 NLRB 413 (1976); Richland Textiles, Inc., 220 NLRB 615 (1975).

The Transfer of Employee Elton Hill

The complaint alleges that on or about October 29, 1982, Respondent, at its Memphis, Tennessee, facility, transferred its employee, Elton Hill, to a less desirable position of employment and assigned to him more onerous work task because he joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act.

Elton Hill has been employed by the Respondent for over two and a half years as a forklift driver. He was involved in the union campaign, attended union meetings, wore union buttons and had a union bumper sticker on his car. He started wearing union buttons about a week before the election. His job before the election was forklift driver in unit 1. His supervisor was Bobby McCullough. The election was held on October 29, in unit 1, just 50 feet from where Hill was working. Hill wore 10 union buttons on the day of the election. On that day, supervisor McCullough approached Hill and told him that he was being transferred to unit 3 to work on a rush trailer at door 68. When he got to door 68, Bo Berry, acting supervisor, told him to go to door 77, as there was no rush trailer at door

68. Hill remained in unit 3 the rest of the day. Employee Steve Presley who at the time was wearing a "Vote No" button, was sent to unit 1 to work in Hill's place.

On Monday, November 1, Hill reported back to unit 1. Bobby McCullough sent him to unit 3, stating that he was needed back there for another week. Hill reported to Jim Stacks, supervisor in unit 3. Stacks was passing out the forklift sheets to the lift drivers. Everyone received a forklift sheet except Hill. Hill was given a productivity sheet and was required to unload the drop trailers by hand. Steve Lenti, the material handler in unit 3, was given a forklift to drive. After November 1, Hill remained in unit 3 and was given the

job of unloading trailers by hand. He was not given a forklift unless a lift driver was absent or on vacation. About a week after the election Hill asked Bo Berry, acting supervisor, what his job position was. Hill testified that Berry told him that it was "job flunky, material handler, whatever I wanted it to be".

When Hill was transferred on October 29, he was harassed by his supervisors. They stood around and watched him. He was told that he could no longer punch in at 7 a.m., but had to punch in at 6:55 to 7 a.m. Hill's testimony was corroborated by employee David Durrough. Durrough also worked in unit 1 prior to the election. The day of the election he had worn 5 Union buttons, and, as in the case

of Elton Hill, the polling area was just 50 feet from Durrough's working area. Durrough testified that his supervisor, McCullough, had instructed him to go to the rush trailer in unit 3 and when they got to unit 3 there was no rush trailer. Employee Greg Gray was transferred from unit 3 to work in Durrough's place in unit 1. While in unit 3, Durrough retained his job title and duties as receiving clerk. On December 15, Durrough was transferred back to unit 1.

Supervisor of unit 1, Bobby McCullough, testified that he was not involved in the decision to transfer Elton Hill. He said he did not know who made the transfer. Similarly, Don Davis, assistant receiving manager. testified that he was not involved in the decision

to transfer Elton Hill and he did not know the reasons for his transfer.

Respondent introduced exhibits which showed the percentage of time that Hill worked as a material handler prior to his transfer on October 29, 1982. However, Hill stated that when he was in unit 1, that unit had no individual materials handler, so the forklift drivers in that unit at times had to get off their lifts and help the truck drivers separate goods. The driver would then stack the goods on pallets for the lift drivers to pull. However, while in unit 3, Hill worked only as a materials handIer, unless someone was absent. And as a materials handler in unit 3 Hill had to separate the material on the truck, drag a pallet into the truck, and then stack

the material on the pallet. He did that exclusively all day.

It is clear from the evidence that Elton Hill, a known union adherent, was transferred to a more onerous position as a materials handler during the period of October 29 through December 17. His proximity to the polling place on election day and his wearing of a union button apparently was too much for Respondent. The result, they transferred him out of there in a hurry. The fact that Hill's immediate supervisor was not able to explain the reason for the transfer, and no explanation was offered by Respondent for the transfer, adds substance to the allegation in the complaint. Moreover, Hill's testimony was not rebutted by Respondent.

Accordingly, I find that the transfer of Hill to a more onerous position during the period of October 29 through December 27 is a violation of Section 8(a)(3) and (1) of the Act. Serv U-Stores, Inc., 225 NLRB 37 (1976); Jack LaLanne Management Corp., 218 NLRB 900 (1975).

The Alleged Surveillance by Respondent's Security Guards

Employee Dennis Gray testified that in late August he noticed the union handbilling outside the gate at the plant entrance. He said there was a guard parked in the front of the gate inside the plant entrance who appeared to be writing down license plate numbers of people accepting union literature then being distributed. The guard would look up and down as the cars went by. Gray

said that the guard was present at the gate on about two occasions while the union was handbilling. He testified further that he had not seen any guards at the gate before or since the union campaign. Employee Kyle Wade Love testified that in late August he noticed a guard while he was driving through the gate on his way home. He said the guard's car was parked facing the gate and on that occasion he observed the guard sitting and watching for about 5 minutes.

Employee Jeffrey Ruffin testified that on some occasions when the union was handbilling at the gate, he noticed the guards watching the handbillers. He said the guards were parked outside the gate, facing the handbillers about 30 feet from

the gate. He noticed the guards at that location about three or four times. He said that prior to the organization campaign, the guards were seen only riding around in the parking lot or inside the building.

Employee Jerry Britton stated that on at least two occasions he saw a guard parked near the gate while the union was handbilling. He said the guard was parked just inside the gate facing the gate. The guard was looking straight towards the gate where the union was handbilling.

Employee Anita Neal testified that the day after she received her Teamster bumper sticker in late September or early October, as she was driving through the

gate one morning to work she noticed two guards in one car sitting at the gate watching the cars as they came in. She said she backed her car into her parking place and stayed in her car for a few minutes. While sitting there, she noticed that the guards who had been sitting at the gate drove down the aisle she was in, they passed her car and stopped about two cars away from her. She said they stopped and the guard on the passenger side wrote something. She said that after the guards drove off she noticed the parked car that was adjacent to the guards' car had a "Teamsters" bumper sticker on it. The guards drove down past three or four more cars and stopped again, but this time she did not see if the guards wrote anything down, but when they drove off she walked up the

aisle and looked at the car they stopped near and noticed that car also had a "Teamsters" sticker on it. The cars next to the two cars with the "Teamsters" stickers had no "Teamsters" stickers. Neal also stated that, in the past, she observed one guard per car in the parking lot but never two in one car. On the occasions described above, the guards did not get out of the car to place notes on the cars as they did when checking for Baddour parking stickers.

Employee Danny Fitch testified that one morning at about 6:30 a.m. in mid-September he noticed two guards in a car parked at the gate facing the gate. Fitch said a union bumper sticker was on his car and, as he drove through, he noticed the guard writing something down.

Fitch then parked about 30 yards away, where he could see what the guards were doing and noticed the guards wrote something down when cars with union bumper stickers came through the gate. Fitch said the guards did not write anything when cars with no union bumper stickers came through. Fitch said that every time the guard would nod his head as if he were writing, Fitch could notice a union bumper sticker on the rear end of the passing car. He said he watched this activity for about 15 minutes. He had not seen the guards at this location prior or after that time.

Employees Leonora Richardson and Charles McDonald testified on behalf of Respondent. They belonged to a committee called BEAUR (Baddour Employees Against

Union Representation). Richardson testified that the committee had handbilled at the gate alongside the Union handbillers. She said that the first two or three times of Union handbilling she was not at the gate. She further testified that there was no occasion when the Union handbilled that she was not either handbilling at the gate or passing through the gate. She said that she noticed the guards parked at the gate on one occasion a week before the election. She said that on that occasion there were two men from Schlitz talking to another employee and there was talk of a gun. During that incident the guards remained at the gate for 4 minutes.

McDonald testified that the first few times the Union handbilled he was not out at the gate handbilling. He said that there was no occasion during which he handbilled or passed through the gate that he noticed the guards parked at the gate. McDonald also said that the members of the committee paid for the material and leaflets that they gave out at the gate. Richardson, however, denied she paid for the literature that was handed out by BEAUR. Both McDonald and Richardson testified that they were pretty busy at the time they were handbilling at the gate.

Tryce Barber, manager of assets protection, testified on behalf of Respondent. He said that the security people had standing orders that if there

was any unusual activity "on our perimeter to dispatch a guard to see what's happening and report back". He said that when the first handbilling activity occurred a guard investigated the handbilling activity. When asked how he knew that, Barber said he heard the guard talking on the radio. When asked how the guard investigated, Barber testified that "he went in a car. We have a patrolman, I guess you'd call it. He was making his rounds and radioed in. He said that there was activity at the gate. I heard him and I went back around there to see what was going on". Barber asked the guard what he saw. The guard's response was, "Just some people assembled at our gate". The guard asked what should he do, "and I just told him to back off and observe and make sure that

he didn't have any instances, you know, fist fights or whatever; make sure the safety of the people was insured; not block the gate, you know, just as long as it was out of the way where people could get in and out of the property. He didn't have any trouble. He radioed back and said everything was going fine". Barber said the guard did not report anything to him after the handbilling activity occurred nor did they report the names of employees who took handbills or who participated in the handbilling activity. Barber also stated that he told the guards to stay and observe other instances of handbilling.

It is clear from a preponderance of the evidence that the guards were engaged in surveillance of the employee's union

activities and I find that such conduct to be in violation of Section 8(a)(1) of the Act. J. P. Stevens and Company, 244 NLRB 407 (1979); Baptist Memorial Hospital, 229 NLRB 45 (1977); Shrewsbury Nursing Home, Inc., 227 NLRB 47 (1976).

The No-Solicitation Rule

In February 1981, the Respondent prepared an employee handbook for distribution to all personnel. On page 24 of that handbook appears the following provision:

> "To avoid interruption of work and complications and distractions in our operations, employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections, or engage in any kind of solicitation during their working time, or in any way to interfere with the work of other employees."

The General Counsel alleges that that rule is a violation of the Act. In addition the promulgation and maintenance of the rule are alleged to be violative conduct interfering with the employees free choice in connection with the October 29, 1982, election.

Respondent argues that in response to the change in Board law concerning rules such as that quoted above (TRW Bearing Division, a DIV of TRW, Inc., 257 NLRB 442 (1981)), the Respondent reviewed its no-solicitation/no-distribution rule and determined that a clarification of the rule was necessary to comply with new Board law. Respondent contends that the clarification was made in the form of a Notice to Employees, dated November 2,

1981, and posted on every bulletin board in Respondent's entire facility. That Notice reads as follows:

NOTICE TO EMPLOYEES

> "In our employee handbook, there is a rule which outlines when and where you cannot solicit your fellow employees, to insure there is no misunderstanding about this, employees are not permitted to solicit for any cause during the time they are supposed to be working or in any way which would interfere with the work of others. These types of activities are only permitted during non-work periods such as lunch, rest periods, and before and after work".

Respondent contends that the Notice was posted throughout the facility and has remained continuously posted since the first week of November 1981. Respondent also contends that the bulletin board form of communication was selected

because it insured that the change in the rule would immediately be brought to the attention of all employees.

Respondent further contends that as the employee handbook had been prepared only 6 months before the announcement of the Board's decision in TRW, supra, the Respondent's management felt that it was unnecessarily costly and inefficient to order the republication of the entire handbook. Respondent contends further that a Notice to Employees bearing the same clarification language is now inserted in all employee handbooks.

Unfortunately that Notice to Employees bearing the same clarification language was not either given to all employees to insert in their own

handbooks nor inserted in all employee handbooks prior to the organizational activity which took place prior to the October 29, 1982, election. It is a well established legal principle that an amendment or a change in a rule should be made by the same medium as the publication and distribution of the rule. There would have been no doubt whatsoever concerning the clarification of the rule and notice to the employees if the employees had been provided with the written clarification personally as they were provided the employee handbooks and manuals and, indeed, anti-union literature during the organization campaign. This should have been done at the time the rules were posted on all employee bulletin boards in the plant. It would not have been necessary for the

employer to republish the entire handbook. All that was necessary to be done was for the employer, at the time it posted the change on the bulletin board, to give each employee a copy of the change and to tell that employee to insert it in his personal copy of the handbook. There is no evidence that Respondent did that.

Supervisor Don Davis testified that that was the only rule and there were no attachments or amendments to the rule as it is shown in the employee handbook. Employees Pat Amsden and David Durrough also testified that there were no attachments or changes to the solicitation rule as it is written in the employee handbook.

Respondent's witness Don Eure, Personnel Manager, who testified that since November 1981, clarification of the solicitation rule has been posted on Respondent's bulletin board. However, contrary to Eure's testimony, Larry Mayes denied ever seeing the clarification of the solicitation rule on Respondent's bulletin board.

Respondent's employee Jerry Williams stated that although he read the bulletin board often, he has never seen a clarification of the solicitation rule prior to the hearing and has never seen it on Respondent's bulletin board. Respondent's witness Don Eure testified that he prepared the clarification of the solicitation rule in November 1981. He also testified that he was also involved

in the preparation of the personnel manual which was distributed in February 1982. He testified that the personnel manual reveals the policy after the clarification. The personnel manual provision which was received in evidence as General Counsel's Exhibit 22 reads as follows:

> "To avoid interruptions of work and complications or distractions in our operations, employees are not permitted to sell anything, distribute or post literature or other matter, make speeches or collections, or engage in any kind of solicitations during the time they are supposed to be working or any way interfere with the work of other employees".

Although Eure testified that the personnel manual solicitation rule quoted above reflected the change after the clarification, a comparison of the

personnel manual with the Notice to Employees, also quoted above, reveals that the significant clarifying sentence is not included, and thus, the rule in my view is ambiguous and invalid on its face under Board law. The omitted sentence reads, "These types of activities are only permitted during non-work periods such as lunch, rest periods, and before and after work".

Having found that the method employed by Respondent to effectuate a change in the rules, i.e., posting on plant bulletin boards rather than giving each employee a personal copy of the clarification for insertion in his copy of the handbook is not sufficient to comply with Board law, it is not necessary to resolve a credibility issue

involving testimony as to whether the notice of clarification was posted on the employee bulletin boards or whether the employees in fact saw them. In addition. the testimony reveals that Respondent's supervisors enforced the invalid rule during the time that Respondent claims the rule was validated by the posted clarification. (E.g., the discussion between Jerry Williams who at the time was handbilling on his day off and his supervisor who told him he could not handbill). I find that, in the circumstances, the Respondent has violated Section 8(a)(1) of the Act by maintaining an invalid no-solicitation rule contained in the employee handbook and the personnel manual and has violated Section 8(a)(1) of the Act in each

instance in which it attempted to enforce such a rule.

Other Alleged 8(a)(1) Activity

Kyle Wade Love, who has been in the employ of Respondent for two and a half years as a tow rail mechanic, testified that on September 14, his immediate supervisor Jim Tarver called Love into his office. Love said that Tarver explained why employee Leroy Mayberry had been fired because he had heard Love tell other employees that too many people had been fired for little or no reason. Tarver told Love that Mayberry was caught sleeping on the job and that somebody else in the warehouse had been caught sleeping and that they had to fire him because the company's back was up against the wall. Love testified that Tarver

then went on the subject of tow rail and conveyors and then talked about the Union. Love said that Tarver told him that the Union "would not help us if it got in there; that he'd worked at several other places that had had unions and he said that they had so many regulations and rules and stuff to go by that it made it hard to get all your work done and that a lot of people got fired because they weren't able to do it. He said that unions also caused businesses to go out of business. He said that by paying too high wages and too good benefits that the company couldn't afford it." He then mentioned International Harvester and Firestone as examples of companies going out of business because of too high wages. Tarver asked Love, "How come the people wanted a union?, and I told him

mainly because of the insurance benefits being cut".

Tarver in testifying on behalf of Respondent admitted that he had a conversation with Love concerning employees sleeping on the job, stating that he told Love, "We had fired other employees and what was fair for one employee was fair for all, and that we had fired Ricky Moore who was another one of my employees prior to -- sometime back." Tarver denied having any discussion with Love about the Union during that meeting. He said, however, that he had a conversation with Love prior to his going on vacation. He said Love approached him in his office and made a statement, "to the effect that he felt there was no job security, and due

to him bringing the conversation up, he said that he felt like that he would have job security with the Union. I had a question and answer sheet memorandum which dealt with security, one of the questions, and I asked him what made him feel that way. And that was the conversation that we had that brought up the Union."

Tarver said that he read out loud to Wade from a memorandum which contained the question, "Can the Union guarantee job security?" He continued, "The answer was 'No'. Look around at all the people from Firestone, John Morrell, International Harvester and others who are out of work. The Union couldn't guarantee job security there. Real job security only comes from a healthy

competitive productive company. At Baddour we are proud of the fact that no warehouse employees and very few others have ever been laid off. That's job security." Tarver said that they discussed tow rail carts during that conversation and the conversation was initiated by Love and that is how he initiated it with the subject of tow rails. Tarver admits that they discussed when he, Tarver, was a member of a union. Tarver then testified, "I told Wade that I once belonged to a union at my prior employer and Wade Love -- I explained to him the Union didn't seem to accomplish anything for me or the other employees that were members of the Union. We paid the dues to the Union and we didn't seem

to ever get any benefit from it.[18] I find the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

Jerry Britton, who has been an employee of Respondent for 4 years as a stocker under the supervision of Don Parker, testified that in late August, Charles Smith, area supervisor, called him into his office. Smith asked Britton what he thought these people outside of the gate wanted from him and other employees. Britton told Smith that they

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[18]/ Tarver's testimony was given in a confused manner and his memory was not good. I credit Kyle Love and I do not credit Jim Tarver. Love's testimony was given in a clear, direct and detailed manner. Moreover, at the time he gave his testimony, Love was an employee of Respondent.

wanted to help the employees of Respondent. Smith told Britton that he didn't think so and that he thought they just wanted their money. Britton responded, "They can't get what we don't have." During that conversation Smith also asked Britton how his little girl was doing and at the end of the conversation Smith asked Britton if there was anything he could help him with or anything of that situation that he could help him with or to let him know.

Britton's testimony was not rebutted by the Respondent. Inasmuch as the employee in this case was called to supervisor Smith's office, which in itself has a coercive effect when interrogated about his feelings about the Union, I find that even though it appears

to be a friendly conversation, it is violative of Section 8(a)(1) of the Act. In addition, it appeared to be a solicitation of employee grievances when he asked him if there was anything he could help him with to let him know. TRW-United Greenfield Division, 245 NLRB 1135 (1979); Willow Corp., 244 NLRB 303 (1979).

Employee Jeffrey Pope, who was employed by Respondent from September 1, 1982 to October 6, 1982, as an order picker under the supervision of Hugh Allen, testified that in mid-September, Hugh Allen came to him and asked him how he felt about a union. Pope responded that he didn't know anything about a union. Allen asked if there was anything he needed to know. Pope stated, "Not

really". He then told Pope if he had any questions about a union, "don't hesitate to ask him or Mike Bond." Allen took him to Bond's office and Bond asked him how he liked his job and whether he was having any problems, and then asked him how he felt about the Union. Pope responded that he didn't know because he didn't have a union job. At that point Bond responded, "They didn't want a union because the union would be bad on the company and that if they could afford to give us a raise, they would. But due to inflation they couldn't." He said that the conversation took place in the presence of Allen, Bond and himself and lasted for about an hour.

Allen admits having had a conversation with Pope in mid-September

but stated that Pope initiated the conversation and that Pope asked him if he could vote in the election. Allen said he merely answered Pope's questions and told him that he would find out and that was the end of the conversation. Pope, on the other hand, testified that it was at a later date, after the two conversations with Allen, that he asked Allen if he would be eligible to vote in the election. Allen admits that he brought Pope to Bond's office and that Pope did not request the meeting and that both Allen and Bond were present in the office with Pope. Allen testified that Bond told Pope about the history of the company and later explained the cut backs that were taking place that might prompt union activity. Allen further testified that during that conversation Pope had

asked questions about the Union such as, "Why are they trying to get in?" Allen was not able to recall any other questions asked by Pope but specifically denied any questions asked by either Bond or himself about the Union. Bond admits the conversation took place but denies making any statements to Pope about how he felt about the Union. He said he only answered the questions Pope asked.[19] Bond testified that Pope was hired on September 1, 1982, and that the conversation he had with Pope was on

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19/ Hugh Allen was not a credible witness. He remembered specifically what was not said in the conversation but could not remember much about what was said in the conversations he had with Pope and Bond. He said that all the questions about the Union were asked by Jeff Pope and not by him or Bond. When asked what questions Pope asked, Allen replied, "I do not remember any specifics, they were just general questions".

September 20. He said when asked if he had a conversation with Pope concerning the Union, his response was, "I had a conversation with Jeffrey Pope on company history." He said the conversation stemmed, "from a question Jeff had approached Hugh Allen on. He came to Hugh Allen and asked him on the 20th, that morning was the 29th, if he would have a right to vote in the election. And at that particular time, no one knew, you know, who would have the right or who would not. And I was talking to Hugh and I told him, you know, Jeff had just started to work for us as an order picker trainee. He had no idea of company history, what the company had done in the past for the individuals and I told him, you know, that I could get together with Jeff and give him -- a list of company

history, things we had done in the past, why the benefits and things of this nature had been cut, were cut, and discuss the whole thing with him." He said the meeting lasted over an hour or an hour and fifteen minutes. When Bond was asked whether he ever asked Pope how he felt about the Union his response was, "definitely not".

I find it difficult to believe that Bond, long time supervisor of the company, and Allen, another supervisor, did not know whether employee Pope would be eligible to vote in the election. I also find it difficult to believe that they would have called Pope to Bond's office and lecture him for an hour and fifteen minutes about the history of the company if they did not in fact know

whether he was eligible to vote in the election. I believe they did know that he was eligible to vote and I also believe, as alleged in the complaint, that Bond asked Pope how he felt about the Union in addition to the other questions Pope said he asked, and I do not credit Bond or Allen based on my observations of them during their testimony and the convenient lack of memory of both Bond and Allen on specific points.[20]

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[20]/ By Motion dated July 1, 1983, the General Counsel moved to correct the official transcript. That Motion is granted. By letter dated July 1, 1983, Respondent submitted the following: Respondent's Motion to Strike Testimony and to Reject Evidence; Respondent's Motion to Reopen Record; and Respondent's Motion to Have Administrative Law Judge Withdraw from Cases. Those Motions are denied for lack of merit.

The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent as set forth in Section III above occurring in connection with the operations of the Respondent, described in Section I above, have a close, intimate relationship to trade, traffic and commerce, among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Baddour, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Baddour, Inc., has engaged in unfair labor practices in violation of Sections 8(a)(1), (3) and (4) of the Act, by discharging, demoting, warning, interrogating, and surveilling its employees.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Baddour, Inc., has engaged in and is engaging in certain unfair labor practices in violation of Sections 8(a)(1), (3) and (4) of the Act,

I shall recommend that it cease and desist therefrom and take certain affirmative action, including the posting of notices designed to effectuate the policies of the Act.

I shall recommend that it cease giving effect to or enforcing the unlawful no-solicitation/no-distribution rule discussed herein; cease its surveillance or giving the impression of surveillance of its employees' union activities; interrogating its employees with respect to their union activities; disciplining its employees, including, discharge warnings or demotions because they have engaged in union activity, or because they gave testimony before the Board.

I shall also recommend that Respondent be ordered to offer reinstatement to employees Larry Mayes, David Cordray, Patrick Amsden, Jerry Williams and Elton Hill, to their former or substantially equivalent positions and to make them whole for any loss of earnings they have suffered as a result of the discrimination practiced against them. Backpay provided herein with interest thereon is to be computed in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950) and Florida Steel Corporation, 231 NLRB 651 (1977); the expunging from its records reference to the discharges, demotions and written warnings and to notify the discriminatees in writing that this has been done and that evidence of this unlawful conduct

will not be used as a basis for any future discipline against them.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

Respondent Baddour, Inc., its officers, agents, successors and assigns, shall:

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[21]/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Maintaining or giving effect to the invalid no-solicitation/no-distribution rule.

(b) Interrogating its employees concerning their protected concerted activities for their mutual aid and protection.

(c) Demoting, warning or otherwise disciplining employees because they have engaged in union activities or testified before the Board.

(d) Surveilling or creating the impression of surveillance of employees' union activities.

(e) Discharging employees because they have engaged in protected concerted activities with other employees for their mutual aid and protection.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Larry Mayes, David Cordray, Patrick Amsden, Jerry Williams and Elton Hill, immediate and full reinstatement to their former positions, or if such positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings suffered by them as a result of their termination or demotion in the manner set forth herein entitled "The Remedy".

(b) Expunge from its records any reference to the discharges, demotions or warnings of its employees Larry Mayes, David Cordray, Patrick Amsden, Jerry Williams and Elton Hill, and notify them in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future discipline against them.

(c) Preserve and make available to the Board or any of its agents upon request, all records necessary to analyze the amount of backpay due under the terms hereof.

(d) Post at its offices and places of business in Memphis, Tennessee, copies of the attached notice marked "Appendix."[22]

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[22]/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE

Copies of said notices on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's authorized representatives, shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26 in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. October 11, 1983.

George Norman
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

After a trial in which all parties have a chance to give evidence, it has been found that we, BADDOUR, INC., have violated the National Labor Relations Act, as amended, and we have been ordered to post and to abide by the following:

WE WILL NOT terminate, demote, give warnings to, refuse to reinstaten or otherwise discriminate against our employees because of their membership in or because they engage in activities on

behalf of the Union or gave testimony before the Board.

WE WILL NOT engage in surveillance or give the impression of surveillance of our employees' union activities.

WE WILL NOT question our employees concerning their union activities, including attendance at union meetings.

WE WILL NOT question employees concerning their sympathy for, and activities on behalf of, Highway and Local Motor Freight Employees, Local 667, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT give any force or effect to the no-solicitation/no-distribution rule printed in our employee handbook and employee manual.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to LARRY MAYES, DAVID CORDRAY, PATRICK AMSDEN, JERRY WILLIAMS and ELTON HILL, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges and WE WILL make them whole with interest for any loss of earnings suffered as a result of

their being discriminatorily terminated or demoted.

BADDOUR, INC.
(Employer)

Dated --- By----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower Building, Suite 800,

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1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38104, Telephone 901-521-2687.

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JD-408-83

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BADDOUR, INC.

Respondent

and

HIGHWAY AND LOCAL MOTOR FREIGHT EMPLOYEES, LOCAL 667, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA — Cases 26-CA-9846, 26-CA-9957, 26-CA-6527

Charging Party

and

ELTON HILL, an Individual — Case 26-CA-9997

Charging Party

and

JERRY LEONARD WILLIAMS, an Individual — Case 26-CA-10121

Charging Party

ERRATUM

On October 11, 1983, a Decision was issued in the above-captioned case. However, through inadvertent error, a disposition of the objections in Case No. 26-RC-6597 was not included. The Order in that case is hereby amended to add the following:

"3. Having found that the objections filed by the Union following the October 29, 1982, election to be meritorious inasmuch as those objections were made allegations in the consolidated complaint, that election is set aside and a second election by secret ballot shall be conducted among the employees in the unit found appropriate by the Regional Director and found appropriate herein, at such time as the Regional Director for Region 26 deems appropriate. The

Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off".

Dated, Washington, D.C. October 25, 1983.

George Norman
Administrative Law Judge

APPENDIX "E"

RELEVANT TEXT OF STATUTES CITED

1. Section 8(a), National Labor Relations Act, 29 U.S.C. §158(a)

a. It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

2. Section 10(e), National Labor Relations Act, 29 U.S.C. §160(e)

e. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

3. Judicial Code and Judiciary, 28 U.S.C. §144

Bias or prejudice of judge. Whenever a party to any

proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

4. National Labor Relations Board's Rules and Regulations, Series 8, as amended

Sec. 102.37 Disqualification of administrative law judges.

- An administrative law judge may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the administrative law judge, at any time following his designation and before filing of his decision, to withdraw on grounds of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the administrative law judge, such affidavit is filed with

due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If the administrative law judge does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling, and proceed with the hearing, or, if the hearing has closed, he shall proceed with issuance of his decision, and the provisions of section 102.26, with respect to review of rulings of administrative law judges, shall thereupon apply.

Sec. 102.64 Conduct of Hearing. - (a) Hearing shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.